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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARK I. SOKOLOW, et al.,

Plaintiffs,

v.

04 CV 00397(GBD)

PALESTINIAN LIBERATION
ORGANIZATION, et al.,

Defendants.

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New York, N.Y.
July 22, 2014
11:30 a.m.

Before:

HON. GEORGE B. DANIELS,

District Judge

APPEARANCES

ARNOLD & PORTER, LLP
Attorneys for Plaintiffs

KENT YALOWITZ

KEN HASHIMOTO

PHILIP HORTON

TAL MACHNES

CARMELA ROMEO

SARA PILDIS

-and-

THE BERKMAN LAW OFFICE, LLC

ROBERT TOLCHIN

MILLER & CHEVALIER, CHARTERED
Attorneys for Defendants

LAURA FERGUSON

BRIAN HILL

MARK ROCHON

MICHAEL SATIN

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(In open court)

MR. YALOWITZ: Good morning, your Honor. Kent Yalowitz from Arnold Porter on behalf of the plaintiffs. With me today are my colleagues Phil Horton, Carmela Romeo and Tal Machnes, as well as Ken Hashimoto and Sara Pildis, who are in the gallery and our cocounsel, Robert Tolchin.

Also I should advise the Court two of our clients are here in the courtroom today, Shmuel Waldman and Mark Sokolow himself. Mr. Sokolow, as the Court may be aware, is an attorney and he is part of a group of attorneys that recently joined our firm, so he's not only a client, he's also now a colleague.

Thank you, your Honor.

THE COURT: You're welcome.

MR. ROCHON: Mark Rochon on behalf of the defendants. With me from Chevalier is Michael Satin, Brian Hill to my right, and Ms. Ferguson on the far right.

Your Honor, in terms of the people present in the courtroom today, we do have some observers as counsel noted and we just want to make sure that no one refers to the matters covered by the protective order during the hearing. Since those parties aren't covered by it, I'm confident we can have our arguments without any reference thereto.

MR. YALOWITZ: We're in open court. I don't expect to be displaying copies of exhibits or anything like that, but I

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1 don't think there's any restriction on saying so and so was
2 paid such and such on such and such a date or something like
3 that.

4 THE COURT: Let me give you some guidance. What I
5 really want to spend the time on is hearing the parties with
6 regard primarily to the defendants' motion for summary
7 judgment, and I don't really need to go through factually all
8 of the allegations here. I have read all of the papers. I
9 have a pretty good idea of what your arguments are. I want to
10 give you an opportunity to highlight what you think are the
11 significant portions of those arguments and to answer my
12 questions that have been raised in the papers.

13 Then I have some other information related to my
14 decision-making and related to some of the other issues that
15 I'm probably going to request from you before I make a
16 decision, particularly with regard to the exhibits and the
17 admissibility of certain evidence in the documentation.

18 As we talk, you'll start to get a feel for what kinds
19 of things I think are relevant for me to have from you and then
20 we can proceed along those lines.

21 I think what probably makes sense is for me to hear
22 first from Mr. Rochon. You're going to argue the motion?

23 MR. ROCHON: Ms. Ferguson is going to address the
24 motion for summary judgment filed by the defendants.

25 THE COURT: Ms. Ferguson.

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1 MS. FERGUSON: Good morning, your Honor. I collected
2 in a binder some of the exhibits I may be referencing in my
3 argument. For ease of reference, I have a copy for you as well
4 as for Mr. Yalowitz.

5 THE COURT: Okay. As I say, to the extent that that
6 part of the argument is dependent on the admissibility of the
7 proposed exhibits, I don't think we need to go through the
8 details of each exhibit. Just give me some guidance as to the
9 legal position you have and the approach that you think I
10 should take with regard to the admissibility of that evidence,
11 the essence of it.

12 MS. FERGUSON: I want to focus on the seven specific
13 attacks shortly and highlight the key evidence and what our
14 position is on that. First, I just want to make a few more
15 overarching comments and I'll keep it brief.

16 The Israeli/Palestinian conflict is an ongoing
17 tragedy. There's no shortage of moral outrage and extremist
18 and inflammatory rhetoric on both sides, but the role of this
19 Court is not to resolve the Israeli/Palestinian conflict, it's
20 not to sort through the propaganda wars on both sides, nor is
21 it in judgment of how Palestinians take care of families that
22 have been affected by the conflict. This is a tort case, and,
23 in fact, it's seven separate tort cases, each with different
24 sets of plaintiffs, different perpetrators.

25 I think when you cut through all of the exhibits you

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1 have been given and all of the rhetoric and all of the
2 inflammatory media clips you've been shown, I think what you'll
3 find is that the core of the plaintiffs' argument is this:
4 Some employees were convicted by Israeli military courts of
5 involvement in these attacks and after the employees' death or
6 while the employee is in prison, their families have received
7 some financial support from the Palestinian Authority, but none
8 of this creates liability under the Federal Anti-Terrorism Act
9 and that's the plaintiffs' sole federal law claim.

10 When you sue under the Federal Anti-Terrorism Act, a
11 statute that provides for treble damages, you need to establish
12 a few very key elements: First, that the defendant, which is
13 here the PA and PLO, not the individual employees, but the
14 defendants have engaged in deliberate wrongdoing; that that
15 deliberate wrongdoing constituted an act of international
16 terrorism, they have to meet that predicate criminal act
17 requirement; and the conduct has to be an actual cause of the
18 plaintiffs' injuries. So the fact that some sheik in a mosque
19 said something pretty hateful five years ago about Israelis has
20 nothing to do with the plaintiffs' injuries. Further, the
21 plaintiffs have to show that there was an intent to injure
22 Americans because the reason this case is here is because U.S.
23 nationals were killed, but there also has to be a showing of
24 intent to harm Americans.

25 With respect to the *respondeat superior* theory, the

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1 idea that because some employees were involved with the PA and
2 PLO are liable, I just want to underscore that the Palestinian
3 Authority at this time had 100,000 employees and it was a time
4 of intense conflict. And the fact that a handful of employees
5 turned to militancy doesn't make the Palestinian Authority as
6 the chief employer in the region liable.

7 Employers are not liable for everything their
8 employees do. And as we go through the seven incidents and you
9 hear Mr. Yalowitz' evidence about these incidents, I think the
10 thing you need to focus on is the absence of evidence that any
11 employee was acting within the scope of employment.

12 Plaintiffs rely a lot on the Israeli military court
13 convictions to show what employees did, but strikingly, even
14 from the Israeli military court, they don't state these acts
15 were carried out by PA employees acting under the direction of
16 the PA or within the scope of their employment.

17 And with respect to the so-called martyr payments or
18 prisoner payments, which is a big theme in the plaintiffs'
19 case, I think it's important to understand that these are
20 generalized policies that with respect to the martyr payments,
21 they applied to thousands of families, not just in the West
22 Bank and Gaza but Palestinians who have been affected by the
23 conflict elsewhere. So it's families who have lost a loved one
24 in a conflict, whether it was during the second intifada,
25 whether somebody was an innocent bystander, whether it's

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1 someone in the Gaza strip today injured in the Israeli/Hamas
2 conflict, so it's a broad-based policy. It wasn't targeted to
3 suicide bombers.

4 Similarly, Palestinians have had many men in Israeli
5 prisons over the course of the conflict and many of them may be
6 as political prisoners, many of them had no involvement in
7 harming civilians. So there is a governmental policy to
8 provide some support for those families.

9 Under the Anti-Terrorism Act, that doesn't amount to
10 material support for terrorism, it happens after the attack,
11 and it's not provided with any intent to support terrorism or
12 to support harming Americans.

13 THE COURT: Let me focus on what I think is the
14 primary issue and I think could be a primary issue for the jury
15 on whether or not, on the edges, the plaintiffs cannot prevail
16 by proving less or they're going to have to prove more or
17 something or they can't be disburdened.

18 The first and primary issues issue is whether or not
19 there will be evidence before a jury that certain individuals
20 either employed by, associated with or at the behest of the PLO
21 and the PA, engaged in terrorist acts or acts of violence; and
22 that the jury in examining their relationship with the PLO and
23 the PA, in examining the evidence of the activity prior to any
24 joint activity, prior to those acts and considering the actions
25 of the PLO in relationship to these individuals after those

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1 acts were perpetrated, whether or not that direct and/or
2 circumstantial evidence will give a jury a basis to conclude
3 that it's more likely than not that they were doing this at the
4 behest or urging or cooperation or assistance of the PLO and
5 the PA. That seems to be, to me, the central issue. It may or
6 may not be the sole issue as I've characterized it with regard
7 to most of the claims and the PLO and the PA's responsibility
8 for acts that caused death or injury to victims of these
9 attacks.

10 The question is a little bit more than they worked for
11 the PLO. So anybody who works for the PLO who commits a crime,
12 you can sue the PLO for, that's not as I understand it their
13 theory. I don't think they're trying to convince me that they
14 can prevail on such a theory. If somebody who is employed by
15 the PA or PLO goes out and robs a bank or robs an individual,
16 that individual can't sue the PA or PLO and say you got to give
17 me that money back because that person was employed by you at
18 the time they committed the robbery.

19 MS. FERGUSON: Exactly.

20 THE COURT: Focus me on what the legal theory is that
21 you say prevents them from getting before a jury to resolve
22 whether or not the PA and the PLO were involved in and
23 participants in acts of violence that were committed as they
24 allege.

25 MS. FERGUSON: Your Honor, when you start to focus in

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1 on particular attacks or incidents, in some cases, there is no
2 evidence of any employee involvement. If I could just give an
3 example, I think that would be helpful. The Mandelkorn
4 plaintiffs: The Mandelkorn plaintiffs, this is the June 19,
5 2002 bombing in French Hill. A man by the name of Sayeed Awada
6 carried out a suicide bombing which injured Shaul Mandelkorn.
7 And there's no claim by the plaintiffs that the suicide bomber
8 was a PA or PLO employee. Their only claim for PA liability is
9 their claim that a man named Nayef Abu Sharkh was involved in
10 some way in the bombing. They don't say how. And they have
11 one piece of evidence for that claim. I think it will be
12 helpful for you to focus on it so you start to get a flavor of
13 their case. It's Plaintiffs' Exhibit 339, it's in your binder
14 and they're in numerical order. It's from the Israeli Ministry
15 of Foreign Affairs.

16 THE COURT: Which exhibit?

17 MS. FERGUSON: It's 339. It's from the Israeli
18 Ministry of Foreign Affairs. It appears to have been printed
19 off of their website. It's about an operation for the
20 confiscation of terror funds. It's dated 2004. On the
21 surface, it's hearsay. It's communicated by the GPO, which is
22 apparently the general press office or Government Press Office.

23 THE COURT: Quote to me, and this is going to be my
24 approach with all of the exhibits because your general argument
25 or your repeated argument that it is based on inadmissible

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1 evidence, I can examine that separately, but I want to, one,
2 assume for part of this argument that they get the evidence in,
3 so if they overcome your objection, then I'd like to know
4 whether you're making an argument that that's not sufficient
5 evidence.

6 MS. FERGUSON: So would you like me to focus on our
7 view of the standard?

8 THE COURT: Well, the second thing I'd like you to do,
9 when you point to an exhibit, show me the fact that you say
10 that they are trying to put before the jury and that you
11 believe is either objectionable, or most of the objections are
12 hearsay, but objectionable as hearsay or objectionable because
13 there's some dispute, genuine dispute, about that fact. For
14 example, quote to me what part of this document is a concern to
15 you.

16 MS. FERGUSON: Sure. If you turn to the fourth page,
17 it's marked with a Bates number P4:38. It states that the bank
18 account of Nayef Abu Sharkh was seized, that he's a fugitive of
19 the Tanzim infrastructure, and that say he was behind the
20 following terrorist acts, and it identifies the June 19, 2002
21 suicide bombing that injured Shaul Mandelkorn. So this is the
22 sole basis for their claim that they should take to the jury
23 this case.

24 THE COURT: Give me more specifics. You say that the
25 statement that an account in the name of Abu Sharkh, a senior

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1 fugitive who was behind the following terrorist acts -- and
2 which bullet-point you say is the terrorist act that is at
3 issue here?

4 MS. FERGUSON: The first one at 19 June 2002, the
5 suicide bombing.

6 THE COURT: With regard to this document so I can
7 start getting a real feel, not just on this motion, but on my
8 further review of admissibility documents, you believe that
9 that's the factual assertion that they want to make and they
10 want to make it in this form, and that in this form, it is
11 inadmissible as a piece of factual evidence.

12 MS. FERGUSON: To be more specific, in opposing a
13 motion for summary judgment, this is the only evidence on which
14 they rely to support their claim of PA involvement in this
15 bombing.

16 THE COURT: This statement doesn't say anything about
17 PA involvement.

18 MS. FERGUSON: Well, they take the next step and they
19 say he's an employee and, in fact, there's no evidence of that
20 either, but they say he's an employee.

21 THE COURT: And that's another thing: They state that
22 he's an employee. Do you deny he was an employee?

23 MS. FERGUSON: The only documentation that is in the
24 record that I'm aware of that we have shows - it's not in your
25 binder but it's Plaintiffs' Trial Exhibit 44 - it shows that

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1 this individual Nayef Abu Sharkh was employed by the General
2 Intelligence Service.

3 THE COURT: You're giving me a lawyer's answer and I
4 asked a simple question.

5 Do you deny that he was a PA or PLO employee at the
6 time?

7 MS. FERGUSON: There's no evidence that he was
8 employed --

9 THE COURT: Again, that's a lawyer's answer. Do you
10 deny that he was a PLO or PA employee at the time?

11 MS. FERGUSON: Yes, we do.

12 THE COURT: All right. You say it is not a fact that
13 he was employed by the PA or the PLO.

14 MS. FERGUSON: At the time of the bombing, yes.

15 THE COURT: Are you saying it that way to leave room
16 for the possibility that he was an employee before that or an
17 employee after that?

18 MS. FERGUSON: He was an employee. As of September 1,
19 2000, he moved from the General Intelligence Service to
20 something called the General Personnel Council, but there's no
21 record showing what happened after that.

22 THE COURT: Is that an arm of the PLO or the PA?

23 MS. FERGUSON: The General Personnel Council is an arm
24 of the PA, but there's no evidence showing that he continues
25 his employment as of 2002.

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1 THE COURT: So you have some evidence to indicate to
2 me that he discontinued his employment?

3 MS. FERGUSON: I don't.

4 THE COURT: When you say you deny, I'm assuming you're
5 not saying to me there's no evidence. I'm assuming you
6 affirmatively are saying to me that the true fact is that
7 there's evidence that he was no longer employed by the PA or
8 the PLO at this time.

9 Are you affirmatively making that statement?

10 MS. FERGUSON: The only thing I can affirmatively
11 state is that there's no evidence -- we're through discovery.
12 There's no evidence that this individual Nayef Abu Sharkh was
13 employed in 2002, but the plaintiffs can't establish that he
14 was.

15 THE COURT: I'm not asking what the plaintiffs can
16 establish.

17 You are, for all intents and purposes, standing in
18 front of me as the PA and the PLO. I want to know whether or
19 not this person is in your employ. That's all I'm asking. And
20 you don't want to answer that question or do you want to shift
21 it to, well, it may be true, but the plaintiffs can't prove it.

22 Is that sort of the response?

23 MS. FERGUSON: I honestly don't know.

24 THE COURT: I know, but how are you disputing the
25 fact? Why are you saying this is an unreliable, incorrect

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1 statement to put before the jury if, in fact, the statement
2 happens to be true?

3 MS. FERGUSON: Plaintiffs have made allegations about
4 many, many employees.

5 THE COURT: Right, and I use this as an example. This
6 is the way I'm going to first approach it.

7 MS. FERGUSON: We produced all of the personnel
8 records that we have that were sought in discovery.

9 Let's assume, for purposes of this argument, that he
10 was an employee, there's no evidence of his involvement in this
11 attack, other than what's clearly hearsay.

12 THE COURT: I know, but I'm trying to understand.
13 Now, you say that you dispute whether or not he was involved in
14 this attack?

15 MS. FERGUSON: Yes, absolutely. And neither side will
16 have any witnesses to talk about who was involved in this
17 attack; the only thing they have is what is clearly
18 inadmissible hearsay. This is their only evidence of an
19 alleged employee's -- let's say we don't know -- his
20 involvement in this particular bombing is these layers of
21 hearsay from this website. That's all there is.

22 THE COURT: I'm not particularly persuaded by your
23 position on every document that we know the true facts, but we
24 are objecting to their assertion of those facts because they
25 can't prove it because we can hide it.

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1 MS. FERGUSON: I'm truly not trying to quarrel with
2 you. I truly don't know. There's been so many employees whose
3 names --

4 THE COURT: I know, but wouldn't it be a most
5 important fact for your client and you as a lawyer, given the
6 nature of this claim, to figure out whether this guy was in the
7 employ of the PLO or the PA at the time? Wouldn't that be the
8 most logical thing? Isn't that the first thing you would, in
9 your mind, want to know?

10 MS. FERGUSON: Your Honor, the only evidence they
11 have --

12 THE COURT: Not "they have." What's the evidence that
13 you have?

14 MS. FERGUSON: We have no evidence whatsoever that
15 this man was involved in the bombing.

16 THE COURT: You have no clue whether you hired this
17 guy or not.

18 MS. FERGUSON: No. I'm saying we have no evidence he
19 was involved in the bombing.

20 THE COURT: I'm not talking about the bombing. That's
21 a separate issue. I understand your argument on the bombing.
22 We discussed that.

23 But a lot your argument is that, well, they can't
24 prove X. Well, I'm trying to figure out is whether X is
25 genuinely a factor in dispute.

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1 MS. FERGUSON: It is their burden of proof and it's
2 their burden to show they have admissible evidence to take to
3 the jury.

4 THE COURT: I understand, but it's your burden upon
5 your objections to show me why the form of their evidence is
6 prejudicial to you or it's unreliable or it is not the true
7 fact.

8 If they want to allege that you're wearing a blue suit
9 today, the first question I'm going to ask you is, well, is
10 that true or not? And you say, well, it doesn't matter whether
11 it's true, they can't prove it because they heard it from
12 somebody else. Well, I'm trying to figure out is what part of
13 this is a lawyer's tactic or what part of this is a genuine
14 dispute about facts.

15 Is it a genuine disputed fact about whether or not he
16 worked for the PLO on this particular day?

17 MS. FERGUSON: Yes, yes, it is.

18 THE COURT: And you deny that he does; you have
19 evidence that he does. Then how is it a genuine dispute of
20 fact if you don't deny that he did?

21 MS. FERGUSON: Let me just say --

22 THE COURT: Saying that they don't have admissible
23 evidence is not the same as saying there's a genuine dispute of
24 fact.

25 A genuine dispute of fact is when they claim X and you

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1 say no. They have evidence that he worked there or they think
2 they have evidence that he worked there, but we deny that he
3 worked there because we know who our employees are and we say
4 no, that is not a true fact.

5 Are you saying that it is not a true fact that he
6 worked for the PLO at that point in time? I hear you not
7 saying that. I hear you not genuinely disputing the fact of
8 whether or not he worked there at that time.

9 MS. FERGUSON: Let me be clear: Our motion for
10 summary judgment on Mandelkorn does not at all turn on Nayef
11 Abu Sharkh's employment status. We didn't make a point of it
12 in the brief.

13 THE COURT: I know, but I'm using this as an example
14 because I can tell you, I have a list of 177 exhibits that
15 everybody wants me to personally go through to figure out
16 whether or not it is inappropriately asserting facts that it is
17 unfair to put before the jury to believe those facts to be
18 true. And I'm trying to figure out whether or not you're
19 saying that simply because that's the way you want to keep it
20 out or are you saying that because you are denying the fact.

21 MS. FERGUSON: In most cases, there is no dispute
22 about whether someone was an employee or not, so maybe we have
23 gotten off on a bit of a wrong foot here. In almost all cases,
24 there's no dispute about the employment status, in part because
25 I don't know. We didn't focus on the employment status. We're

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1 not relying on whether he was or whether he's not employed.

2 THE COURT: So to the extent that they're alleging
3 that any of these individuals was employed by the PLO at the
4 time, you're not disputing that fact?

5 MS. FERGUSON: Let me just be clear: For almost all
6 of these individuals, the allegations are that they were
7 employed by the PA, not the PLO.

8 THE COURT: All right. The PA or the PLO. I'm sorry.
9 One or the other.

10 MS. FERGUSON: Yes, for most of these people, we have
11 personnel records, we have payment records.

12 THE COURT: So that's not the nature of your hearsay
13 objection or unreliability objection with regard to any of the
14 exhibits. So when I look at an exhibit and it says X was
15 employed by the PA or the PLO, that's not what you're objecting
16 to.

17 MS. FERGUSON: Ninety-nine percent of this case will
18 not be about whether somebody was on the payroll or not.

19 THE COURT: Fine.

20 MS. FERGUSON: There will be questions about whether
21 there's any evidence that person was involved in the terrorist
22 attack, which is what I was trying to focus on here, and I'm
23 sorry if we got off on the wrong foot. I apologize.

24 THE COURT: No, this is advancing it significantly for
25 me, so let me close out that loop so I can concentrate on where

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1 the genuine dispute is.

2 With regard to your objection to the admissibility of
3 evidence, you're not objecting, at least on a hearsay basis, to
4 the assertions that these individuals were employed by the PLO
5 on the dates in which the terrorist acts were allegedly
6 committed.

7 MS. FERGUSON: Correct.

8 THE COURT: That's not the nature of your objection to
9 a document that says he was employed by the PA or PLO.

10 MS. FERGUSON: No. As I say, in most cases, almost
11 all, we produced the personnel records and payment records.
12 There's no dispute about it.

13 THE COURT: With regard to most, if not all, of the
14 exhibits that would indicate that the PA or the PLO took
15 certain actions with regard to those individuals subsequent to
16 the alleged terrorist acts, you're not disputing most or any of
17 that. When they say, well, they made payments to family
18 members or they indicated they were martyrs, most of that,
19 that's not the nature of most of your objection.

20 MS. FERGUSON: We perused the records that showed
21 payments to the prisoners' families, payments through the
22 martyrs institute.

23 THE COURT: You're not disputing that, and you don't
24 really have a genuine basis to say that evidence of that is
25 inadmissible to show a relationship between the PA and the PLO

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1 and these individuals or to demonstrate that they at least took
2 in most cases a positive and supportive view of these
3 individuals subsequent to these acts, as opposed to a negative
4 and unsupportive position with regard to these individuals and
5 their families? "Why" is a different question. You say
6 because that's what they do generally, but you're not disputing
7 as to that.

8 MS. FERGUSON: I think it's fair to say that there's
9 not going to be a lot of dispute about whether someone was
10 employed by the PA. There certainly will be dispute about, for
11 example, with this Nayef Abu Sharkh, whether there's evidence
12 that he had any involvement in the attack.

13 THE COURT: Right. Let's put that aside.

14 MS. FERGUSON: There won't be any significant dispute
15 on was this person an employee, there will not be a dispute
16 about did they get payments from the Ministry of Detainees, did
17 their families get payments, what those payments mean in terms
18 of whether it was just supporting the family or whether it was
19 glorifying terrorism, we certainly don't agree with.

20 THE COURT: Right. I understand.

21 MS. FERGUSON: Right.

22 THE COURT: So your primary basis for your summary
23 judgment motion and for your objection to the admissibility of
24 certain exhibits and how they're interrelated has to primarily
25 do with their hearsay and unreliable attempt to demonstrate

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1 that these individuals were, in fact, the perpetrators of these
2 acts.

3 Is that primarily it?

4 MS. FERGUSON: Well, I would say in my mind, the cases
5 fall into two categories. There's a few cases. And this case
6 involving the Mandelkorns falls into this category, as does the
7 case involving the Guettas, and the case involving the
8 Sokolows, so let's say three. Don't told hold me to that.

9 So there's one group where I would say there's no
10 admissible evidence that the PA or PLO employee had any role in
11 the attack at all.

12 THE COURT: I want to be more specific than that.
13 There's no evidence that the person that they want to
14 demonstrate perpetrated the act or a person that they say was
15 directly a participant in assisting and perpetrating that act,
16 there's no evidence, they have no admissible evidence to prove
17 that those PA or PLO employees were, in fact, participants in
18 those acts prior to or during when those acts were committed,
19 that's basically the essence of the argument, right?

20 MS. FERGUSON: Correct. So I'm not trying to draw a
21 distinction between the actual bomber or shooter versus the
22 people who were alleged planners.

23 THE COURT: Right, but the people who they identified
24 as associated with the PLO and the PA that they say they want
25 to present evidence that they perpetrated or participated in

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1 those crimes, you say that primarily the problem with their
2 case is they cannot prove, by admissible evidence, that these
3 individuals that they say are associated with the PA or the PLO
4 did, in fact, participate in the acts of violence.

5 MS. FERGUSON: That's certainly true with this
6 Mandelkorn case where this Israeli Ministry of Foreign Affairs
7 is the only evidence of a PA employee involvement.

8 You'll also hear about the Guetta case where the
9 allegation that a PA employee was involved was based on an
10 eye-witness identification 12 years after the shooting based on
11 a photo array provided by counsel. There's no evidence that
12 that person was identified as a PA employee.

13 THE COURT: Again, you say there's no evidence that
14 that person identified was a PA employee. Are you denying that
15 that person was a PA employee?

16 MS. FERGUSON: I don't know --

17 THE COURT: Well, you should know, right? The only
18 person that knows is the employer, right?

19 MS. FERGUSON: Right. There's 12 very murky photos.

20 THE COURT: Do you completely not know as the lawyer
21 or is there some reason why you can't know that?

22 MS. FERGUSON: I think there is a dispute in the
23 Guetta case about the reliability of that eye-witness
24 identification.

25 THE COURT: I understand that. Now, I have to decide

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1 whether that goes to its admissibility or it goes to its
2 weight. The woman saw somebody, pointed him out and said
3 that's guy who committed the act. I'm not sure that your
4 attacks on whether or not she is correct or incorrect precludes
5 that as evidence. I'll look at it more closely.

6 But I can tell you that there are plenty of times when
7 people make identifications under similar circumstances. The
8 only thing that you have that is significantly different in
9 this case than other postoffense identifications is the passage
10 of time. I don't know whether or not anything that you say is
11 so suggestive about the identification that it would
12 automatically make it inadmissible rather than give you an
13 argument that it is unreliable and the jury shouldn't accept
14 that.

15 MS. FERGUSON: Just to make sure we don't miss the
16 big-picture point: I guess my only point is that there are,
17 like I say, three incidents, shootings, bombings, where our
18 position is that the plaintiffs can't establish even any PA
19 employee involvement.

20 There are others where we're arguing even if they
21 could establish PA employee involvement, this is the
22 fundamental point: There's no evidence of any PA or PLO
23 culpability beyond the fact that these people were on the
24 payroll. And as I said, there's 100,000 people on the payroll.
25 So for *respondeat superior* liability to apply here, the

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1 plaintiffs have to show that these people were acting within
2 the scope of their employment.

3 THE COURT: I understand that.

4 MS. FERGUSON: There's a complete absence of evidence
5 of that.

6 THE COURT: But I need to get by the first basic point
7 of whether or not you're genuinely telling me that no, these
8 people didn't work for us. If you're not telling me that, then
9 there's a genuine dispute. You can't say to me, well, we know
10 it. Our clients know whether they worked for them. In fact,
11 we know they worked for us, but the other side just really
12 doesn't have a way to prove that. That sounds like your
13 argument at this point unless you're going to affirmatively
14 make a statement.

15 Quite frankly, with regard to some of these exhibits,
16 depending on the nature of what statements in these exhibits
17 are being offered for their truth, I'm, at this point,
18 contemplating whether or not you should have to simply respond
19 to a request to admit one way or the other and put this issue
20 to rest.

21 If you say they can't prove whether this person is an
22 employee, then they should put in a request to admit to you
23 whether or not this person was employed and you should either
24 say yes, he was or no, he wasn't. And then at least tell me
25 there's a genuine dispute over this if your response has to be

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1 yes, he was, then I can make a decision whether or not that
2 means the document can be admitted to demonstrate that fact, or
3 your simple admission that he was a PA employee should be
4 admitted and then put that to rest and move on and figure out
5 whether or not they have enough of a case to put to the jury
6 for the jury to otherwise determine liability of the PA and
7 PLO.

8 MS. FERGUSON: I think for purposes of the motion for
9 summary judgment, our position would be that even if the people
10 they claim are PA employees are PA employees - and in 95
11 percent of the time, we would agree - that even if they're all
12 PA employees, people who are alleged to be PA employees,
13 there's still no triable issue of fact as to PA or PLO
14 involvement.

15 THE COURT: Because they have no admissible evidence
16 prior to or during the act or any evidence that would indicate
17 their acknowledgment after those acts or evidence that they
18 were aware that those acts were planned, that they or some
19 employee or agents of those defendants participated in planning
20 that, assisting or the acts taking place; and if the evidence
21 simply showed that they, as the plaintiffs would argue,
22 rewarded those individuals after the fact, that that would not
23 make them necessarily liable or it might be sufficient alone to
24 make them liable for the acts themselves that were committed.

25 MS. FERGUSON: Exactly. There's no admissible

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1 evidence of any preattack knowledge by the PA or PLO. There's
2 no evidence that the PA or PLO officials directed or authorized
3 the attack. There's no admissible evidence that the PA or PLO
4 provided any material support to the people involved in the
5 attack. And there's no evidence that these postattack payments
6 to prisoners and families which is part of a more generalized
7 policy caused the attacks, was provided with any intent to
8 support the attacks. A government has lots of reasons why it
9 provides programs to its people, and there's no evidence that
10 these policies in any way caused the plaintiffs' injuries. The
11 scope of employment issue I really think is key to this case.

12 THE COURT: Sure. If they're hired to do terrorist
13 acts, there the defendants are liable for those acts that are
14 within what they were expected to do as PA or PLO employees.

15 If they were off the ranch, as they say, on their own
16 personal vendettas, then I think you're probably right; that is
17 not sufficient alone to establish their liability under any
18 theory.

19 MS. FERGUSON: For example, because we have this
20 document here, this Nayef Abu Sharkh, so even if this document
21 were admissible, and we contend it's not, it describes this man
22 as a senior fugitive of the Tanzim infrastructure. It doesn't
23 say he committed the attack as a PA or PLO employee, and
24 there's no other evidence that he did, and there won't be a
25 witness that he did.

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1 THE COURT: Let's agree that there is little to no
2 direct evidence that the PA or the PLO were direct participants
3 in these terrorist acts before or while they were taking place.

4 MS. FERGUSON: Correct. That's right.

5 THE COURT: They can point it out to me, but this is
6 clearly a case that is dependent on the circumstantial evidence
7 and the reasonable inferences to be drawn from facts.

8 And unless they have some direct evidence of some memo
9 or email or some witness who is going to say, yeah, I was at
10 the meeting at the PLO and they planned this or something,
11 that's not the nature of their proof here as I understand it.

12 MS. FERGUSON: Right.

13 THE COURT: Now, if they want to point out some direct
14 evidence that they want to emphasize that saves one or two of
15 these cases, that's fine, but I don't think that direct
16 evidence exists.

17 So the real question is, is whether or not the
18 circumstantial evidence and the reasonable inferences to be
19 drawn by a trier of fact based on what one might anticipate the
20 admissible evidence would be would be enough to persuade a
21 reasonable jury that it is more likely than not that the PLO
22 and the PA was involved in these acts sufficiently to hold them
23 liable or not.

24 MS. FERGUSON: I think when you look at the
25 circumstantial evidence and you address two key factors for

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1 *respondeat superior*, what was the time and place and scope of
2 limitations of the person's job and were they doing it at the
3 behest of the employer without a personal motive? I think the
4 circumstantial evidence makes clear that these didn't fall
5 within the scope of employment.

6 For example, there's the Goldberg case that arises out
7 of the suicide bomber who had been fired from his job and set
8 off a bomb.

9 THE COURT: No one here was fired from their job, so
10 it's a little bit of a different analogy you're drawing. In
11 fact, as they say, their position is they have evidence they
12 were further embraced after these acts took place.

13 MS. FERGUSON: My main point is that his job was at
14 the Bethlehem Police Department and the bombing is in
15 Jerusalem. So there's no evidence that these people were all
16 working together as part of their job, that they were wearing
17 uniforms, that they were in any way on-duty. In fact, some of
18 the evidence, even in the Israeli military court files,
19 suggests that if his colleague had only reported him to the PA
20 as missing, then this act wouldn't have happened, so it's
21 assuming the PA would have responded if they had only known he
22 was missing.

23 The other evidence is that the people who carried out
24 these attacks, these are desperate, unhinged people that
25 carried out these suicide bombings and shootings, and many of

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1 them acted because their brother was killed.

2 THE COURT: But the circumstantial evidence, the
3 question is, does it go in the direction of noninvolvement,
4 does it go into the direction of involvement or is it neutral?
5 Is it consistent with they're not involved or is it more
6 consistent with they are involved?

7 Well, obviously, if someone commits a violent crime
8 causing death or injury and my response is "good job," that is
9 evidence, obviously, that we would all have to agree may not be
10 proof sufficient, but it is some evidence to consider as to
11 whether or not this person may have been doing it at my behest.

12 MS. FERGUSON: I think the only documents that would
13 suggest the good job are some of these so-called martyr files
14 where the family is seeking compensation. Often because the
15 Israelis have this so-called punitive home destruction policy
16 where they would mow down the family's home even if the family
17 had no involvement in the bombing at all, so that's the reason
18 for these policies. And, again, it wasn't just for suicide
19 bombers. The people that are dying in Gaza would be eligible
20 for these martyr payments.

21 THE COURT: That's an argument to be made, don't you
22 think, to a reasonable jury, depending on whether or not the
23 circumstantial evidence is sufficient if I assume the facts in
24 their favor - and I'm thinking of it from a juror's
25 perspective, not from a lawyer's perspective. The argument is,

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1 is that if you do a martyr payment, the question is, you have
2 three choices: You can give everybody martyr payments, which
3 apparently is the position here; you can say you all get martyr
4 payments for certain kinds of activity and not include acts of
5 violence and death; or you can say we will give martyr payments
6 for activity, unless it is that kind of activity, because we
7 don't want to encourage people to engage in that kind of
8 activity, and we know that giving them martyr payments is
9 obviously some incentive for them to do so. Once we give
10 martyr payments to the first person who does it, it is
11 obviously some incentive for others to continue to do it. And
12 one might argue our tacit, if not explicit, approval of
13 encouragement of other people to do it because we're letting
14 them know if we do it, we will reward them, wouldn't a
15 reasonable jury be interested in at least considering that if
16 there's a factual basis to support such a position?

17 MS. FERGUSON: I think it has to be legally relevant.
18 It has to fit within the framework of the Anti-Terrorism Act.

19 THE COURT: That would be relevant; you would admit
20 that. It's relevant whether or not I paid you for doing the
21 act after you did it as to whether or not I have some
22 involvement in the act.

23 If you had said if they had come to me and said, you
24 know, I just killed ten people, can I have \$10,000 and you said
25 no, you can't have \$10,000 because we're not going to give you

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1 money for doing that kind of thing, you would be standing in
2 front of me saying that's the relevant evidence to indicate
3 that they don't have any involvement.

4 MS. FERGUSON: This is the money that was paid to the
5 families. It's a very small amount of money. There's no
6 evidence that these payments are --

7 THE COURT: You can say it may be a small amount of
8 money, as they say, and that's all relevant, but it is not an
9 insignificant amount of money because it was obviously money
10 that they thought should be given to the family and would
11 benefit the family.

12 MS. FERGUSON: But there's no evidence that any of the
13 people that carried out these shootings or bombings were in any
14 way motivated by the prospect that their family would get some
15 small amount of money.

16 There was a much greater chance the family's home was
17 going to be destroyed if they had some sort of financial
18 calculus in mind, it wouldn't lead them to carry out a bombing
19 or shooting that would end their life.

20 THE COURT: Let's put it this way: It wouldn't
21 discourage them. If I were to put it on one side of the scale
22 or the other, I'm not going to put it on the side of
23 discouraging them. I'm going to put it on the side of the
24 scale of encouraging them, right? That would be logical,
25 right?

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1 MS. FERGUSON: I think this is where it's important to
2 focus on the causation standard.

3 THE COURT: Right.

4 MS. FERGUSON: And the Supreme Court in the 2014
5 *Paroline* case and then the Second Circuit in *Rothstein v. UBS*
6 and then again in the *September 11* case from 2013 really make
7 clear that proximate cause is not this completely loosey-goosey
8 standard; that you have to show that the defendants' wrongful
9 conduct was an actual cause in a sense that a lay person would
10 understand of the plaintiffs' injuries.

11 THE COURT: Let me play out this scenario as best I
12 can from their point of view.

13 They want to argue to the jury that, look, we have the
14 circumstantial evidence and the facts from which you should
15 infer that the PA and the PLO are responsible for these acts of
16 terror. The nature of our evidence is this:

17 One, the individuals who perpetrated these crimes,
18 they were, in fact, employees of the PA or the PLO primarily at
19 the time they committed the acts, but we don't have to debate
20 about whether or not prior to or after, but primarily we're
21 going to show that primarily they were employed by the PA and
22 PLO.

23 We're going to also show you evidence that there was
24 contact and assistance provided to these individuals by other
25 PLO or PA employees or agents of the PA or PLO itself, whether

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1 it's releasing people or assisting them or protecting them from
2 apprehension when there were warrants out for them or whatever
3 evidence that they say they're going to present.

4 And we're going to present evidence that after these
5 acts were perpetrated, that these individuals were all
6 rewarded, and rewarded for committing these acts. And the PA
7 and the PLO made statements complimenting these individuals for
8 committing these acts, and they made payments to their families
9 in remuneration in support of that. And they took other
10 actions to promote them further in the PA and the PLO because
11 they committed these acts.

12 Basically, you will conclude that this was part of
13 their employment by the PA and the PLO, that if they wanted to
14 sacrifice themselves or otherwise commit violent acts of
15 terror, that that was what the PLO wanted them to do or the PA
16 wanted them to do, that's what they encouraged them to do and
17 that's what they rewarded them for doing. That's the case that
18 we intend to present, and after you hear the evidence of those
19 instances, you will also conclude that it is more likely than
20 not that what we saw is the case is the case, and that it will
21 be sufficient for you to find the PA and/or the PLO liable.

22 Now, I don't know if you would disagree with my
23 attempted characterization of their case, and I'm not sure that
24 if they were able to prove that, that you would say that that
25 kind of case couldn't get to the jury, but what I hear you

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1 saying is although they say that that's what they want to
2 prove, their proof is deficient in certain respects.

3 You're not arguing about whether or not if that's what
4 they can prove, that that would make them liable. That's not
5 the legal argument.

6 The legal argument is, they don't have primarily any
7 evidence that, one, that these individuals who they want to
8 accuse and that Israel and other determinations have been made
9 unreliably or assumptions have been made that these were the
10 people responsible for that, they have no proof, admissible
11 proof, in order to be able to prove that these people were, in
12 fact, responsible for this act. And they have no other
13 evidence, other than simply that these people were treated just
14 like any other families or people or individuals who suffered
15 or were injured or killed in pursuit of the general cause were
16 treated, and that doesn't make the PA responsible for every act
17 of terror that may have been committed by others. And it
18 certainly doesn't make the PA or PLO responsible for acts of
19 terror that they want to prove were perpetrated by the PLO and
20 the PA employees when they have absolutely no admissible
21 evidence to prove that. And they can't just walk in here and
22 say before a jury, look, an Israeli military authority wrote a
23 report and there's a line in the report that says they think
24 this person did it, so that's admissible evidence in a court of
25 law to convince you that this person did it. It doesn't work

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1 that way.

2 MS. FERGUSON: Right.

3 THE COURT: They can't just do that. That's just like
4 going to the corner and asking somebody standing on the corner
5 who shot Kennedy and they say, well, I think it was conspiracy.
6 All right. So you come back in here and you say to the jury I
7 spoke to a guy on the corner and he says it was a conspiracy,
8 so you're supposed to conclude that it was conspiracy.

9 I think I understand generally your theory of what you
10 want me to apply. If I have mischaracterized that, tell me in
11 what way I mischaracterized what my analysis should be of the
12 facts that they say they want to rely on.

13 MS. FERGUSON: Two refinements on that: One would be
14 that certainly our position is a lack of admissible evidence to
15 support claims of scope of employment, things like the release,
16 we say there's no evidence of that, so it's largely a lack of
17 admissible evidence.

18 THE COURT: When you say "scope of employment," I
19 assume you're limiting that to committing acts of terror within
20 the scope of employment of these individuals who committed
21 those acts and what they were employed to do, that was part of
22 what they were employed to do by the PA and the PLO.

23 MS. FERGUSON: Right. And I think because you have
24 these seven different separate lawsuits or separate bombings,
25 shootings combined together and the case is largely built on

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1 inadmissible evidence, you get the sense the cumulative impact
2 is, well, there must be some connection here. But if you look
3 at each incident and the evidence that supports it, it's
4 largely based on this kind of thing you're seeing in the
5 Mandelkorn case where it's just very thin. It's not
6 admissible.

7 So, if you weed out all of the admissible evidence, I
8 don't think a reasonable jury could conclude that there was
9 some pattern of having PA employees engage in terrorism. There
10 is no admissible evidence to support that claim.

11 THE COURT: As I say, there's always a question of
12 whether or not it is simply coincidence that all of the people
13 who are accused of committing these terrorist acts were PA or
14 PLO employees at the time.

15 MS. FERGUSON: I guess the other refinement I want to
16 make is we have to keep remembering that this is a foreign
17 government and an almost-socialist society where the government
18 is the main employer. The population is pretty impoverished,
19 so it's providing a lot of support payments and it also has to
20 make a lot of payments to keep a lid on things to prevent
21 extremists from taking over. So to take the fact that the
22 government is shelling out lots of money to the population in
23 general, providing lots of jobs, and then to take the fact that
24 a few people have turned to militancy, you can't make a
25 government liable and also subject the public fisc to treble

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1 damages.

2 THE COURT: Right. I wouldn't disagree with that nor
3 couldn't they convince me to disagree with that if there's no
4 evidence to conclude that this was the intent of the PLO or the
5 PA.

6 MS. FERGUSON: I do think while our case is largely a
7 lack of admissible evidence sort of burden of proof case, there
8 are some key areas where we do disagree with the plaintiffs on
9 the legal standard, and I'll refer to the Court to the
10 briefing, but we have argued that you shouldn't have *respondeat*
11 *superior* liability in a statute with extraterritorial scope and
12 treble damages, but if you do, that because it's a government,
13 it should be a standard that requires a showing that it was
14 pursuant to a PA official policy or custom or practice.

15 THE COURT: I understand, as I say, the lawyer's
16 disagreement about that, but I'm not sure I really
17 realistically understand the difference in terms of what a jury
18 would have to determine under either one of these theories.

19 The jury is still going to have to determine that it
20 was either the intent of the PA or the PLO that these people
21 carried out these acts or it was in the scope of what they were
22 expected to do, right? I don't care which standard you use.
23 It seems to me that they would be liable under some theory if
24 it was their intent that these people commit terrorist acts and
25 they, in fact, were hired to do so. It was within the scope of

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1 what they were expected to do.

2 MS. FERGUSON: If you think about the New York City
3 Police Department and you have a cop that shoots someone, so
4 the first question is going to be was he on-duty?

5 THE COURT: Well, it's the same two questions that I
6 have: One, whether it was within the scope of his employment
7 to just go out and shoot people for no reason or whether or not
8 it was the intent of the police department to have him go out
9 and shoot somebody that day or to go out and shoot somebody.

10 Now, if that was the case, *respondeat superior*, that
11 theory doesn't even apply simply because he went out and shot
12 somebody because he was a police officer.

13 MS. FERGUSON: I think the plaintiffs have argued it's
14 enough for them to show that he was an employee but they don't
15 have to show that it was consistent with the PA intent or
16 policy.

17 THE COURT: You two are sort of arguing about
18 *respondeat superior* as opposed to a *Monell* claim. Also, what's
19 going to be helpful to me is I want to get your requests to
20 charge because I'm not quite sure how a jury is supposed to
21 make that distinction given these set of facts.

22 Either these people were doing this at the behest of
23 the PLO and the PA or they weren't. I don't care which theory
24 you want to proceed on. If it was within the scope of their
25 employment to go out and do terrorist acts, I'm not sure what

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1 theory you say would not make the PLO liable.

2 MS. FERGUSON: I think as you listen to plaintiffs'
3 counsel, I think it's really important to think about what
4 evidence they have that anything was done at the behest of the
5 PA or PLO. There's a complete absence of that evidence which
6 is why we think there's no triable issue of fact.

7 THE COURT: The one piece of evidence that they do
8 have whether or not it's sufficient or not to get to the jury
9 is that they'll argue, well, look, when they did these acts,
10 they rewarded them for it. That's a piece of evidence, isn't
11 it? It may not be determinative of the issue. It may not be
12 sufficient evidence, but that's evidence that it's within the
13 scope of their employ. They're being paid to do it, right?
14 They're getting financial remuneration after they do it.

15 MS. FERGUSON: But it's part of a generalized payment
16 policy of broad application, and when a government has a
17 general payment policy of broad application, you don't have the
18 necessary scienter for purposes of the Anti-Terrorism Act which
19 imposes automatic treble damages.

20 THE COURT: I understand that, but think about the
21 example you just gave me, which I think is a very good example
22 and in the case law. Take the police example.

23 You would agree that it would be some relevant
24 evidence as to, and whether you want to call it a *Monell* claim
25 or you want to call it *respondeat superior*, it would be

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1 relevant evidence of whether or not the police officer who shot
2 somebody was relieved of duty and fired after that or whether
3 or not he was promoted to captain and given a bonus, right?

4 You would have to agree that would be a relevant
5 consideration to try to determine whether or not the police
6 department should be responsible for the conduct that is at
7 issue here, right?

8 MS. FERGUSON: That sounds like sort of a ratification
9 theory of liability.

10 THE COURT: No, it's not a ratification theory of
11 liability. The question is, I may agree with you that that, in
12 and of itself, doesn't make them liable, but I'm trying to say
13 that at least that's evidence of what they intended that's some
14 evidence of whether or not this was within the scope of his
15 employment, that's some evidence of whether or not this is what
16 they expected him to do or whether or not they directed him to
17 do so. One is inconsistent with being a participant of that
18 and one is more consistent with having the intent and being a
19 participant of that.

20 You would agree that depending on how they reacted to
21 it, that's some evidence of whether or not they had nothing to
22 do with it or had something to do with it.

23 MS. FERGUSON: This is the real peril of having a jury
24 sitting in New York in 2014 trying to judge what the
25 Palestinian Authority was doing ten, 12 years ago in the

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1 context of a completely different society and government. It
2 wasn't, in fact, evidence of support for bombing because
3 they're providing these payments across the board.

4 THE COURT: That's a reasonable argument to make to a
5 jury. I think a jury can understand that argument. If the
6 facts are persuasive on that issue, a jury could understand
7 that. I don't think the rules that we're applying here are
8 somehow dated. It applies to the PLO now and it applies to the
9 PLO then.

10 If you say that there's a reasonable, logical way to
11 look at this other than looking at it in the way that the
12 plaintiffs want the jury to look at it --

13 MS. FERGUSON: So you're saying a jury could find and
14 impose to the plaintiffs - at one point were seeking \$3 billion
15 in damages - because the PA pays people in prison and has an
16 across-the-board practice of promoting people while they're in
17 prison?

18 THE COURT: No, because they would obviously be
19 entitled to hear that part of the evidence as part of their
20 evaluation of whether or not they believed that the PA or the
21 PLO were responsible for the acts that these individuals
22 committed.

23 MS. FERGUSON: I guess my point is, that's all there
24 is here.

25 THE COURT: That's what I have to look at and that's

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1 your primary argument.

2 MS. FERGUSON: And that that's enough.

3 THE COURT: They can try to convince me that's enough
4 and maybe they have an argument that that's enough, but no,
5 they have to show it. They have to put a case before a jury so
6 that the jury could logically conclude that the PA and the PLO
7 was involved in the terrorist act itself, either commanded
8 these individuals to commit those acts, either encouraged these
9 individuals to commit these acts, that there were circumstances
10 that one could logically conclude that it was in the scope of
11 their employment to commit these acts, that it would be
12 expected of them, and that there is evidence to conclude that
13 this is what the PLO and the PA wanted them to do and were glad
14 that they did it.

15 MS. FERGUSON: There's no evidence of that.

16 THE COURT: And the PA or PLO either directly
17 participated in that or hired them or expected them to do that
18 as part of their work. My understanding is most of the
19 individuals that they say that they will prove are the
20 perpetrators were employed in either a military or paramilitary
21 way by the PA or the PLO; that would be some relevant
22 consideration, too.

23 I think there was a woman bomber who was not in that
24 capacity.

25 MS. FERGUSON: She wasn't employed by the PLO.

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1 THE COURT: She wasn't the person directly employed.
2 Their theory with that is that the person that assisted her was
3 directly employed.

4 MS. FERGUSON: There's no admissible evidence of that.
5 They're relying on a custodial statement that's implicated by a
6 third party.

7 THE COURT: Again, are you denying he was employed?

8 MS. FERGUSON: There's no evidence he was involved --
9 I can deny that this man named Abu Sharkh, I deny he was
10 employed. I deny that there's any evidence that he had any
11 role in orchestrating this bombing. Their only evidence is
12 this custodial statement of Munzar Noor, and that's a good
13 example.

14 You can't use a custodial statement of a Palestinian
15 under interrogation by Shin Bet to finger someone else to
16 establish that there's a third person who did it, but that's
17 what their case is based on.

18 THE COURT: I hear the essence of your argument is
19 that the two primary disputed issues of fact which they cannot
20 even present admissible evidence on, and that is, one, with
21 regard to who, in fact, were the individuals who perpetrated
22 these acts; and, two, that there is any connection between the
23 PA and the PLO and these acts, any involvement as an
24 institution, government or how ever way either side wants to
25 characterize it; that the entity of the PLO or the PA, they

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1 have no evidence to offer that they were participants in
2 planning, directing or executing the plans that were committed,
3 the violent acts that caused death or injury by whomever it is
4 who committed these acts.

5 Therefore, unless they can point to me what would be
6 admissible evidence of these individuals committing these acts
7 and admissible evidence that the PA or the PLO has some
8 connection with these acts that they shouldn't give it to a
9 jury. That's what I hear the essence of your argument is.

10 MS. FERGUSON: The last thing I'd add on because I
11 understand these prisoner payments and martyr payments are
12 something that you're focused on, I wanted to provide a little
13 context about the prisoner payments and the promotion of people
14 in prison.

15 We focused a lot of the briefing about the problems of
16 the Israeli military court convictions and the very high
17 conviction rates. Most Palestinians just plead guilty. We
18 don't view it as a fair system, and the Palestinians don't view
19 it as a fair system. And the PA didn't have jurisdiction to
20 investigate these attacks in Jerusalem. There was a history
21 that human rights organizations have recognized that a lot of
22 people were sent to these detention centers that didn't kill
23 civilians, so the PA wasn't in a position to make guilt or
24 innocence determinations and, as I said, a lot of these people
25 were viewed as political prisoners.

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1 It's difficult for them to be making assessments. Is
2 this person in prison because the Israelis are engaging in
3 social control or is this person in prison because they did it?
4 Now, in some cases, somebody got up in open court and said they
5 did it, but in other cases, it was unclear, so there was this
6 policy. We don't know, they couldn't investigate it and they
7 didn't address this in the military court system.

8 THE COURT: I know, but I'm not sure in what context
9 that you say that I'm supposed to evaluate that in order to say
10 that I determined that there's a good reason why they did this
11 so, therefore, it shouldn't be part of this case. I can't
12 determine that. That's a factual determination. It's a
13 reasonableness determination that's a defense.

14 If they say they gave money to people who committed
15 terrorist acts after they committed the terrorist acts and
16 because they committed terrorist acts, for you to come back and
17 say, yeah, but we got a good reason for it, isn't that
18 something I, as a judge, can do anything about.

19 MS. FERGUSON: There is no evidence of that at all.
20 There's evidence that they paid detainees and detainees'
21 families, not because they committed terrorist acts. There's
22 no evidence of that.

23 THE COURT: Again, but still, I'm not sure what I'm
24 supposed to do with that.

25 If they say to me, Judge, we have evidence that we

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1 want to present that they paid every single one of these
2 individuals after they committed the terrorist act, we want the
3 jury to infer from that that they were being rewarded for their
4 terrorist acts, for you to come back to me and say, well, no,
5 that's not why they did it, we have a lot of other reasons why
6 they did it and that wasn't it, I'm not sure why that's summary
7 judgment.

8 They say, absent some other good excuse, the jury is
9 at least entitled to hear that they paid these people after
10 they committed the terrorist acts and there's no evidence that
11 they paid them for something other than the terrorist acts.

12 Now, you want to come back and say no, but that's not
13 why they paid them for and we want to demonstrate that they
14 paid them because they just give out remuneration for family
15 members who are killed in the cause or family members who are
16 suffering because their relative is in jail, and that's what
17 they routinely do, that's fine, but that's not a legal issue.

18 MS. FERGUSON: You have to go back to the elements of
19 the Anti-Terrorism Act and whether there's any evidence that
20 the PA pays detainees with this intent to support terrorism, in
21 particular attacks on Americans, and whether this policy of
22 paying detainees actually caused the injuries to these
23 particular plaintiffs.

24 Ultimately, it is a tort case that comes down to what
25 was the tortious conduct, is it tortious, was it conducted with

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1 the requisite scienter and did it cause injuries?

2 THE COURT: But the PA and PLO make their own
3 determination as to whether or not people who commit acts of
4 terror will be included in those payments. That in and of
5 itself is some evidence that they're not excluding people from
6 those payments or discouraging people from not taking these
7 acts.

8 Now, that's not in and of itself sufficient to prove a
9 case or to even get a case to the jury, but it's clearly
10 evidence to be considered as to whether or not they approved or
11 disapproved of the conduct that these people were engaged in.

12 If they can prove that these people were engaged in
13 that conduct and they can prove that as a result of being
14 engaged in that conduct, that was the reason that they
15 would -- remember, here it's not just the payments; it's the
16 payments coupled with, in many cases, promotions within the
17 PLO. And they want to argue that they were promoted and paid
18 as reward for compensation for committing these acts of terror.

19 MS. FERGUSON: There was a lock-step promotion system
20 for all security service employees.

21 THE COURT: If that's the answer from the other side,
22 that's fine, and the jury can reject it but that doesn't take
23 away from the fact that if a person commits --

24 MS. FERGUSON: But there's no admissible evidence --

25 THE COURT: If my law clerk goes out and robs a bank

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1 this afternoon and then comes back and tells me I just robbed a
2 bank and I say, okay, here's an extra \$10, there would be
3 evidence of at least that I'm not disapproving your bad
4 activity. As I say, this is not law. That's factual, common
5 sense.

6 MS. FERGUSON: The only evidence is the evidence of
7 the existence of these policies, not that they're targeted to
8 particular people for rewarding particular people, and I think
9 that is the only evidence in this case.

10 THE COURT: Okay.

11 MS. FERGUSON: And for a jury to decide that the
12 Palestinian Authority's policy of continuing to pay security
13 service employees while they're in prison when many of them are
14 in prison, just because they belong to what's considered an
15 illegal organization or have engaged in stone-throwing, for a
16 host of reasons, and to pay families whose homes have been
17 destroyed, who lost their breadwinner, who are going to be
18 starving, for a jury to say, oh, we think that's supporting
19 terrorism, there's no evidence of that. So that's all their
20 case is.

21 THE COURT: I may have the facts wrong or the
22 allegations wrong, but my understanding is there's at least on
23 one occasion that the PLO or the PA took action to arrest an
24 individual, and after taking action that they determined was
25 sufficient to arrest this individual, this individual was

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1 released. And the plaintiffs allege he committed the terrorist
2 act and after committing the terrorist act, the PA or the PLO
3 rewarded him for committing that terrorist act.

4 Now, your factual argument and reason for making the
5 payment is a legitimate one for the jury to consider, but it
6 seems to me that if that is what the evidence is that they can
7 present, it would be reasonable for the jury to consider
8 whether or not that was truly the reason for this payment since
9 they arrested the person themselves and they kept the person in
10 jail and they didn't pay the family and they did it at the
11 behest and insistence of, if not the Israeli authorities, but
12 they did it because of certain acts that this person committed.
13 So the question would be, well, why didn't you pay him before?

14 If you were going to arrest him yourself, what would
15 be the rationale for once he commits a terrorist act now to
16 compensate him or his family when you didn't compensate them
17 before without the terrorist act? Then at least one could
18 consider whether the logic is what's motivating you is the
19 terrorist act.

20 Now, I may have the facts wrong. It's obviously a
21 complicated to the actual scenario in six different situations.

22 MS. FERGUSON: There are two different cases where
23 there's an alleged arrest and release.

24 THE COURT: Right.

25 MS. FERGUSON: In both cases, one was a Hamas bombing

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1 who wasn't a PA or PLO employee and the other was man, Mohamed
2 Hashaika, who had been a PA employee, but his personnel records
3 show he had been fired.

4 But leaving that aside, there's no evidence of the
5 so-called releases. For Abdullah Barghouti, the only evidence
6 of release is that during his interrogation, he told the
7 Israelis that they let him go. And for Hashaika, the only
8 evidence of release is some speculation from one of these
9 Israeli Ministry of Foreign Affairs websites. Actually, it's
10 the prime minister's office website saying that Hashaika
11 carried out this attack and the PA must have released him.
12 They just assumed that he had been released.

13 THE COURT: Doesn't the PA know whether they released
14 him or not?

15 MS. FERGUSON: The files that we produced in this case
16 that are part of their exhibits show that he escaped during the
17 conflict.

18 THE COURT: That's a factual dispute.

19 MS. FERGUSON: I'm saying there is no admissible
20 evidence of his release. So it sounds provocative, but there's
21 no evidence that it would come in.

22 THE COURT: Those are the kinds of things that I'm
23 looking for, specifically as to whether or not there is, in
24 fact, any admissible evidence. They'll have to explain to me
25 how they intend to prove this. And as you say, you're right,

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1 with regard to things that are genuinely believed to be not
2 reliable facts or are genuinely disputed by the PLO or the PA,
3 they're going to have to give me some basis to admit what would
4 be inadmissible evidence in any other case in this courthouse.

5 It can't simply be that somebody said that they think
6 this is the guy who did it. That's not the way it works, and
7 it never works that way. That's why we have the rules that we
8 have. If they don't have it, if they can't convince me that
9 they have clearly admissible evidence on these issues, then
10 they shouldn't get to the jury on these issues on one or more
11 of these situations. I think I understand the overall argument
12 that you're making.

13 MS. FERGUSON: Thank you, your Honor.

14 THE COURT: Thank you.

15 Let me just first start with ten minutes for the
16 plaintiffs and then we'll take a lunch break.

17 MR. YALOWITZ: Ten minutes?

18 THE COURT: Yes.

19 MR. YALOWITZ: May it please the Court.

20 I'd like to begin with the hypothetical that
21 Ms. Ferguson mentioned of the NYPD officer. What we have here
22 in this case is evidence not just of the fact that some of
23 these perpetrators - I think of the seven attacks, we have
24 about 15 employees who are perpetrators - it's not just that
25 they were employees.

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1 Imagine a case where the NYPD was hiring people with
2 prior records of violent crimes and they bring them onto the
3 force, number one; number two, imagine that some of these
4 police officers, while they're on the force, are known to be
5 engaging in terrorist activity and, in fact, go over to New
6 Jersey and shoot people up and do stuff like that and the New
7 Jersey authorities say, this particular police officer is
8 committing terrorism, please arrest him, and they do arrest
9 him.

10 The NYPD arrests him and they interrogate him. And,
11 in fact, there's a document in our case where they were
12 interrogating this guy Hashaika who, by the way, we have
13 evidence that he remained on the force until his death and in
14 fact, he was promoted posthumously, so that's a disputed issue
15 of fact. But in any case, this fellow Hashaika is being
16 interrogated and not only is he being interrogated but that's
17 being reported to Arafat himself.

18 So imagine Mayor de Blasio gets a particular report
19 that we're interrogating this police officer. Find out what it
20 is that he was doing. He is released. Another disputed issue
21 of fact: We have government reports and custodial statements
22 of Hashaika and Shawish, who was his coconspirator, he was not
23 a police officer. He was teamed up with Hashaika in this
24 particular crime. And those statements say that he was
25 actually released, affirmatively released. And then, you have

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1 cases where it's not just a rookie cop or a beat cop, but
2 pretty senior officers, captains, people who a jury could
3 conclude are managerial agents planning and conducting this
4 activity.

5 THE COURT: Planning and conducting what activity?

6 MR. YALOWITZ: Terrorism, planning the shootings,
7 planning the bombings.

8 THE COURT: You mean other shootings and bombings?

9 MR. YALOWITZ: Correct. Correct. And then they get
10 arrested and they get convicted and they have sentencings.

11 Your Honor, I just watched today's sentencing and I
12 saw a man express what appeared to me to be genuine remorse,
13 and I think it affected me. I think it may have affected the
14 Court in terms of the sentence that the Court provided. He
15 seemed to speak very genuinely about his life.

16 Well, in our cases, the police officers at their
17 sentencings, they didn't express that kind of remorse. They
18 said I'm sorry I didn't kill more Jews. That's what they said.
19 Or they said there are more like me or I hope my son grows up
20 to do what I did. That's what the evidence will show about
21 these officers.

22 Then, it's not just the conduct of the officers; it's
23 a series of police magazines. These are magazines not
24 independently published. These are published by the police
25 department. The magazines, we have quoted from them in

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1 paragraph 56 of our Rule 56.1 statement, conveniently number 56
2 so it's easy to find. These are really inflammatory statements
3 saying spill your blood in favor of Palestine; saying the
4 presence of the Jews on this land is a crime; comparing Jewish
5 people to Nazis.

6 Those are not like random people out there in the
7 world speaking about their prejudices. These are official
8 police publications, which is evidence of what the official PA
9 policy might be.

10 Then after these people are convicted, as we have
11 pointed out, they're not paid under some social welfare
12 program. They are kept on the payroll and they are given
13 promotions. Some of them have had four promotions while they
14 sit in jail.

15 And it's not just the promotions and the pay, they
16 also put on TV shows about these guys on the PA-owned TV
17 station. And the evidence will show that it's not like ABC or
18 CBS. They don't have a First Amendment in the West Bank and
19 Gaza. It's owned and controlled by the PA itself. And these
20 TV shows say what a great guy Nasser Shawish was or what a hero
21 these people were.

22 Then multiply that not by a few random, radicalized
23 guys, which is what the defendants will say, multiply that by a
24 hundred PA police officers who are listed as being in jail for
25 committing terrorist crimes on the PA police's own website.

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1 They put them up there saying these are the guys who are in
2 jail for security crimes, here is their rank and here is who
3 they are. I think there are 97 of them, and that's just from
4 one branch. That's not from the intelligence service. That's
5 not from the preventative security. They have six branches of
6 the PA police.

7 I'm happy to talk for a while.

8 THE COURT: I don't want to interrupt you, but I
9 wanted you to finish that complete story, because the story you
10 just gave me, I assume you're not finished with it because it
11 still doesn't tell me in what theory you have that the PA or
12 the PLO were involved in this particular act of terrorism.

13 MR. YALOWITZ: Sure.

14 THE COURT: That's what I'm looking for. I'm trying
15 to figure out what is your theory. I assume your theory isn't
16 just they support terror in general so that means we can sue
17 them for this particular act.

18 MR. YALOWITZ: You are correct. So in these cases, we
19 have got four legal theories to connect the PA with these
20 individuals.

21 THE COURT: All right.

22 MR. YALOWITZ: Legal theory number one as we have been
23 talking about is *respondeat superior*.

24 THE COURT: Why don't you run through the four and
25 then we'll come back after lunch.

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1 MR. YALOWITZ: Then we can talk further. So that's
2 number one. Number two, acts of a managerial agent. So if a
3 person is senior enough, if they're a managerial agent and they
4 commit an act, then that's within the scope. It's a variation
5 on *respondeat superior*.

6 THE COURT: Right. It's not much different.

7 MR. YALOWITZ: It depends on their seniority level.

8 Number three is ratification. Even if you didn't have
9 the approval - and you'll see this in the request to charge -
10 even if you didn't have the approval in advance, if they are
11 aware of the circumstances, which they were here, and they
12 expressed an approval of the activity, which they did here,
13 there's ratification.

14 Then number four is material support and resources for
15 terrorists and terrorist organizations.

16 THE COURT: We can discuss it further, but I want to
17 focus you on one and two I don't think are significantly
18 different theories. Three and four require, and you can
19 convince me if you think I'm incorrect, they require a certain
20 element.

21 Three is which one?

22 MR. YALOWITZ: Ratification.

23 THE COURT: Ratification: I'm not sure that I know of
24 a legal theory that simply says that because I later said that
25 I approve of what they did, that makes me responsible for the

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1 act.

2 If a guy goes out and shoots somebody because he beat
3 up his wife, for you to say you know what, I think he did the
4 right thing, it doesn't mean they can sue you, right? Right.

5 So that ratification theory, you have to give me a
6 different theory other than they later approved of it to make
7 them culpable for the acts when they took place. I'm not sure
8 I understand completely your theory. I'll let you respond.

9 And the last one with regard to the material support.

10 MR. YALOWITZ: Material support and resources.

11 THE COURT: Material support, it cannot simply be
12 material support of terrorism in general.

13 MR. YALOWITZ: Correct.

14 THE COURT: It's got to be material support of the
15 terrorist act that you're basing the claim on. So it can't
16 simply be we're in favor of terrorism in general. You both
17 have cited cases, and I'm more than intimately familiar with *In*
18 *Re: Terrorist* and the case behind that because that's the case
19 I'm involved in.

20 MR. YALOWITZ: Right.

21 THE COURT: The circuit and the Supreme Court have
22 made it clear that you can't just say you support terror, you
23 gave money because you knew these guys were terrorists and,
24 therefore, you're liable under the act. They say you have to
25 give money with the reasonable expectation that this is the act

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1 that they were going to support; that act of terror.

2 MR. YALOWITZ: If I may. You continue. I didn't mean
3 to interrupt.

4 THE COURT: I'm done. I was just going to say you can
5 address all of that after lunch.

6 MR. YALOWITZ: I can't wait. If your Honor can bear
7 with me for a minute.

8 THE COURT: Sure.

9 MR. YALOWITZ: First of all, on the ratification,
10 there's an important Second Circuit case which is pretty
11 recent. I think it's called *Choudhary* or something like that.
12 I may have the name wrong. It was a torture victim case out of
13 the Eastern District.

14 The charge to the jury was if you find that the
15 employee was acting in a way that was contrary to the
16 directions originally given, but later the employer knew about
17 the actions and approved of them and manifested an approval,
18 then you can find ratification.

19 THE COURT: When you say "manifested an approval," it
20 depends on what you mean. They can't just say I approve and
21 then that makes them liable.

22 MR. YALOWITZ: Right. Well, it could be "I approve,"
23 but we don't have just "I approve." We have they kept them on
24 the payroll, they gave them promotions, they put TV shows out
25 saying they were national heros. We have guys who were

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1 employees, they blew themselves up and in their martyr file,
2 the PA says this person is a national hero because of what he
3 did, and we're going to give his family money for the rest of
4 their lives.

5 THE COURT: You'd have to convince me. And as I say,
6 part of it, it will be interesting to see what you say is the
7 relevant jury instruction on that, but you have to convince me
8 that simply because they did one or more of those things
9 subsequent to the act, that makes them *nunc pro tunc*
10 responsible for the act.

11 MR. YALOWITZ: I would say it a little differently,
12 which is that is evidence which a reasonable jury could
13 conclude makes them liable *nunc pro tunc*. And I do want to get
14 to that jury instruction. We have been looking at it. We had
15 to go dig it out of the docket because the circuit approved it,
16 so it's very useful in that regard.

17 THE COURT: The factual awkwardness of that theory is
18 that it's not consistent with multiple acts of terror.

19 If your theory is that seven different acts of terror
20 occurred and after the acts of terror occurred, they ratified
21 it independently and that's what makes them individually
22 liable, well, that's a little inconsistent with arguing that
23 they wanted all of these acts to take place and they took some
24 affirmative act during the time to encourage these acts to take
25 place. I understand that part of the theory. But unless they

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1 participated in the act prior to or during their commission, it
2 is unclear to me what factual scenario you say would make them
3 responsible for it even if they said we thought it was a good
4 thing.

5 MR. YALOWITZ: You mean before the fact or after?

6 THE COURT: No. After the fact. Your ratification
7 theory only deals with activity after the fact.

8 MR. YALOWITZ: Right.

9 THE COURT: You're saying that you can make them
10 liable simply because of the conduct that you want to point to
11 that they engaged in in relationship to that particular
12 employee after the fact.

13 The fact that they didn't fire the employee by itself
14 you would probably have to agree could not constitute
15 ratification. The fact that they promoted the person after the
16 fact you probably would have to agree alone does not constitute
17 ratification so that they could be sued. The fact that they
18 made payments to family members after the fact alone, I assume
19 you're not saying that that would make them liable for the acts
20 itself.

21 It seems to me that unless you prove one of your first
22 two theories, you don't even have a ratification theory. I
23 don't know how you could demonstrate that it was not within the
24 scope of the employment and was not a managerial employee who
25 did it at the time, but they ratified it later, that there

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1 would be some ratification theory that could make them liable
2 for an act that they never participated in, they never helped
3 plan, they never helped execute, simply because after the fact
4 you want to argue that they, quote, somehow ratified it.

5 I guess your theory would have to be they ratified it
6 because they compensated him for committing that act.

7 MR. YALOWITZ: First of all, in your hypothetical, I
8 think I would be entitled to the *Choudhary* charge. I wish I
9 could confirm that that's the name, *Choudhary*.

10 THE COURT: I'll look it up if you want.

11 MR. YALOWITZ: It's in my brief. I just didn't bring
12 it up to the podium.

13 THE COURT: I'll look at it over lunch.

14 MR. YALOWITZ: It starts with a "Ch."

15 THE COURT: *Choudhary*, I think.

16 MR. YALOWITZ: It's a 2014 Second Circuit case.

17 THE COURT: Fine.

18 MR. YALOWITZ: That's the exact jury instruction. So
19 I think given the facts of my case, I am entitled to that jury
20 instruction even without all of the other circumstantial
21 evidence that goes to pattern, practice, custom, incitement.

22 THE COURT: I'd have to look at it, but you believe
23 that even if there was a situation where I was totally unaware
24 that they were planning to commit this act, that I had
25 absolutely nothing to do with them committing the act, and I

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1 did nothing to help, encourage or command them to commit the
2 act, that my actions alone of continuing to employ them,
3 promoting them, saying I agree with what they did and giving
4 them a bonus for what they did in and of itself would make me
5 liable to the victims of the crime even though I had absolutely
6 nothing to do with the crime?

7 MR. YALOWITZ: I think it would.

8 THE COURT: I'll look at your theory, but I'm not sure
9 I understand it.

10 MR. YALOWITZ: That's obviously not our case.

11 THE COURT: If it's not your case, it can't be your
12 theory.

13 MR. YALOWITZ: It's a jury instruction. I want the
14 instruction.

15 THE COURT: I don't know of any case, I don't know of
16 any theory of ratification -- and I assume you're only arguing
17 it in an employee/employer context.

18 MR. YALOWITZ: Absolutely.

19 THE COURT: But I don't know any theory of
20 ratification where the evidence would be insufficient to
21 demonstrate *respondeat superior* or insufficient to demonstrate
22 managerial acts, but it would still be sufficient to
23 demonstrate some sort of postconduct, postterrorist act
24 ratification.

25 MR. YALOWITZ: Let me just take back what I agreed to,

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1 because I think there are circumstances. Take the female
2 bomber Wafa Idris who blew herself up in front of Mark Sokolow
3 and his family on a public street, she was not an employee of
4 the PA.

5 THE COURT: Right.

6 MR. YALOWITZ: Then they studied her case, the
7 official martyr institute studied her case and they came out
8 saying with a martyr file, the report, like their government
9 report saying she blew herself up in Israel.

10 THE COURT: Right.

11 MR. YALOWITZ: She's a hero of the intifada and her
12 family is entitled to money for the rest of their lives.

13 THE COURT: Right.

14 MR. YALOWITZ: Then they go and they name summer camps
15 for children after her.

16 THE COURT: Right.

17 MR. YALOWITZ: She's like a national hero. They made
18 her into a national hero, so my theory of the case is that is
19 ratification.

20 THE COURT: So that makes anybody who was a victim of
21 her terrorist act, that gives them the right to sue them
22 because they applauded the act afterwards. Your theory isn't
23 even that she's an employee of them. Your theory on that
24 theory is they had nothing to do with her.

25 Suppose it was another entity that sort of agreed with

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1 that and they say you know what? I agree with you, they did a
2 good thing and we're going to make a scholarship in her name
3 and we call her a martyr, and we're going to help the family.
4 Do you think the victim could sue that entity?

5 MR. YALOWITZ: I'd have to think about it.

6 THE COURT: That would be a tough one. This is a
7 politically charged circumstance. You can't say everybody
8 agreed with what she did, no matter how terrible it would be,
9 what any of these terrorists did, you can't say that everybody
10 agreed with it or took some acts to say I'm glad it occurred
11 that that they can be sued as a defendant by one of the victims
12 of the perpetrator.

13 That can't be your theory.

14 MR. YALOWITZ: No, it's not. So Saddam Hussein gave
15 money to a lot of terrorist families. We're not suing Saddam
16 Hussein.

17 THE COURT: Right. Do you think you have a right to
18 sue Saddam Hussein?

19 MR. YALOWITZ: I don't think so.

20 THE COURT: As I say, a terrible example, but if
21 Microsoft decided to do it, do you think you can sue Microsoft?
22 That's not a theory that I'm familiar with that you can sue the
23 company that has nothing to do with the act because they
24 decided that they agreed with what occurred.

25 MR. YALOWITZ: Now, in the case of Idris, of course,

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1 there was other evidence of PA involvement.

2 THE COURT: Yes, but I'm talking about your theory.
3 You gave me four different independent theories. And I'm not
4 as confident about an independent theory on these set of facts
5 of ratification that if they had no participation whatsoever in
6 planning or in executing the terrorist act, that there would be
7 another theory that you can sue them under because they simply
8 later ratified, whether they're an employee or not, because
9 some are employees and some are not.

10 MR. YALOWITZ: Our case is in between. It's not
11 Microsoft. It's her government. And they're putting out
12 incitement and literature and speeches saying this is a good
13 thing to do. When people, even if they're not employees, when
14 their citizens do it, they reward it.

15 THE COURT: Let me reverse that and then we'll take a
16 break. Let's switch the entities here. Suppose someone took a
17 terrorist act against the PLO or the PA, and that person took a
18 terrorist act and it turned out to be a citizen of Israel. And
19 the PLO said it was a terrorist act. The person said no, this
20 was a person who was a threat to Israel and we thought it was
21 necessary to assassinate the person and then Israel said we
22 agree, we have looked at the circumstances. We agree that this
23 was a person who should have been assassinated, we're glad that
24 person was assassinated, we think this person is a national
25 hero.

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1 Do you think that they could sue the government of
2 Israel under a theory of they ratified it?

3 MR. YALOWITZ: Leaving aside the sovereign immunity
4 issues?

5 THE COURT: Yes, leaving aside sovereign immunity.

6 MR. YALOWITZ: This is a sovereign immunity act of
7 war.

8 THE COURT: I'm trying to see this theory of
9 ratification.

10 You wouldn't argue that they could sue an entity that
11 didn't have sovereign immunity simply because they said they
12 agreed with it in this politically charged atmosphere?

13 MR. YALOWITZ: Right. It's not the mere agreement.
14 It's the combination of encouragement in advance.

15 THE COURT: But encouragement in advance is not
16 ratification.

17 MR. YALOWITZ: Agreed. Agreed.

18 THE COURT: I'm talking about a theory that you have
19 that you say is independent of whether or not they had any
20 involvement with it prior to that, and having involvement with
21 it prior to that is not a ratification theory.

22 MR. YALOWITZ: I want to look at it further, but I
23 think the Court is right here that ratification goes to
24 employees or agents.

25 THE COURT: It's not really a separate theory.

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1 MR. YALOWITZ: It goes to a way in which the acts of
2 the employee or agent can be traced to the entity.

3 THE COURT: Ratification may be a way to demonstrate
4 that it is evidence that this person did an act within the
5 scope of their employment, but I don't understand it as a
6 separate theory if they didn't do the act within the scope of
7 their employment.

8 MR. YALOWITZ: Where I was getting crossed up is that
9 it's not just employment; there are other ways of showing
10 agency.

11 THE COURT: Right.

12 MR. YALOWITZ: Our theory would be that somebody who
13 is encouraged and talks to employees and so on and so forth,
14 hanging around the edges, even if they're not a formal
15 employee, they're hanging around the edges, and then they go
16 off and commit a tort, and then the entity says, yeah, they did
17 a good thing, so I think they have to have some prior
18 relationship.

19 THE COURT: I think they have to have more than just a
20 prior relationship; I think they have to have some prior
21 involvement in the act or it's an act that was within the scope
22 of their employment.

23 If they had no prior relationship to the act, it's
24 rather dangerous for me to say that we can start suing people
25 who had nothing to do with the act but they later said that it

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1 was a good thing and they later did things that demonstrated
2 that they took that position.

3 It would be like if I owned a store in Alabama and
4 somebody decided they want to kill somebody because he's a
5 civil rights worker, that because I say I think it was a good
6 thing and I would have killed him myself, that means I could be
7 sued for the act that was committed because I ratified it.
8 That doesn't work that way.

9 MR. YALOWITZ: We're talking about a much more subtle
10 issue here. We're talking about a guy who hangs around the
11 store and does odd jobs and there's a nod that somebody needs
12 taken care of.

13 THE COURT: Yes, but that's not ratification. Every
14 time you give me a fact that occurs before the act takes place,
15 that takes it out of a ratification argument.

16 I'm talking about a theory where I had nothing to do
17 with it prior to it, and your only legal theory that I should
18 be sued and be liable for it is because of my subsequent
19 ratification of an act that I had nothing to do with before it
20 took place.

21 MR. YALOWITZ: Right.

22 THE COURT: I don't know of such a thing.

23 MR. YALOWITZ: I think you and I agree that we need
24 some circumstantial evidence of prior encouragement and I think
25 we have a lot of that.

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1 THE COURT: Let's take the lunch break. Let's
2 continue at 2:30. I'll give you a full opportunity to respond.

3 MR. YALOWITZ: Thank you.

4 (Luncheon recess)

5 AFTERNOON SESSION

6 2:35 p.m.

7 (In open court)

8 THE COURT: Yes, Mr. Yalowitz.

9 MR. YALOWITZ: Thanks, Judge.

10 While we were on the break, I had a chance to find the
11 charge from the *Choudhary* case. I didn't find it. My
12 colleague, Mr. Hashimoto, called back to the office and he
13 found it.

14 It confirms I think what I was trying to say, which is
15 that the relationship between the person who perpetrated the
16 crime or tort and the entity has to be some relationship of
17 agency or employee.

18 So Wafa Idris getting a scholarship from Microsoft,
19 she has no agency relationship with Microsoft. The
20 ratification is a way of dealing with the agency or employment
21 relationship and if I could just read the charge to you from
22 *Choudhary*, and I'll give you the cite.

23 THE COURT: I don't think it was in the case.

24 MR. YALOWITZ: Right. The charge is not in the Second
25 Circuit case. We had to go to the docket and look up the

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1 charge. The charge is ratification, adoption or approval means
2 to treat the act as if it was originally authorized.

3 THE COURT: Okay.

4 MR. YALOWITZ: A defendant is liable for the conduct
5 of the agent if after the fact the defendant ratified, adopted
6 or approved of that conduct, even if it was originally
7 unauthorized. *Choudhary* was an agency case. It wasn't an
8 employment case. I think I would concede that there has to be
9 some prior relationship of some kind.

10 THE COURT: I'll keep that in mind when I look at your
11 jury instructions, but my initial reaction would be that it's
12 got to be some sort of ratification, and to the extent that the
13 employer is taking on some sort of legal obligation which was
14 represented by the acts of the agent.

15 When you loosely use the word "ratification," I don't
16 think it's defined as simply we agree with what he did. It has
17 to be "Yes, he has done that on our behalf." That's a
18 ratification.

19 MR. YALOWITZ: I think that's a nuance that we're
20 going to need to sort out in the jury charge. I don't want it
21 to be a loose, you know, just anybody who says "it's good" has
22 ratified. That wouldn't be helpful.

23 THE COURT: Right.

24 MR. YALOWITZ: That's not what I'm looking for.

25 THE COURT: As long as the ratification means that you

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1 adopt the activities of the agent as your own.

2 MR. YALOWITZ: Right.

3 THE COURT: Let's put it this way: It obviously
4 doesn't rise in this case to the extent that the PLO or the PA
5 is saying that he acted on our behalf, so we take full
6 responsibility for his actions; that would be the ultimate
7 ratification.

8 MR. YALOWITZ: I think that we have here a facts and
9 circumstances ratification rather than a they passed a national
10 resolution saying, you know, these acts are officially
11 ratified. It's not like a board of directors' ratification.

12 THE COURT: Yes. I'm saying in most instances of
13 ratification, there has to be clear evidence that they have
14 accepted the act as their own.

15 MR. YALOWITZ: Based on the facts and circumstances.

16 THE COURT: Right.

17 MR. YALOWITZ: Correct.

18 THE COURT: And now to what extent do you say that
19 they have manifested an intent to accept that terrorist act as
20 their own, I'm not sure, and I'll look at your jury
21 instructions, but I'm not sure that you have such an
22 independent theory beyond whether or not --

23 MR. YALOWITZ: I think actually Wafa Idris is a good
24 example of this.

25 The evidence is that she was a confidential informant

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1 to the General Intelligence Service. She was not an employee.
2 She gave them intelligence information. And the evidence which
3 Ms. Ferguson helpfully provided in our binder in Exhibit 465 is
4 that this fellow, Abu Talal, who was a GIS employee, wanted a
5 female suicide bomber.

6 THE COURT: Right.

7 MR. YALOWITZ: Do you have 465?

8 THE COURT: Yes.

9 MR. YALOWITZ: So, if you look at the second and third
10 page, this is a confession by a guy who ultimately pled guilty
11 to participating in this suicide bombing and here is his
12 confession. If you look at the bottom of page two he says, and
13 I'm looking at lines 19 and 20, he says: Abu Talal asked me
14 what I thought about Wafa. I said to him that I didn't know
15 and we should ask her. And then Abu Talal approached Wafa
16 Idris and invited her to his home.

17 So that's kind of the set-up.

18 Then if you look at the next page, this is sort of a
19 key admission. He says: In the home of Abu Talal, that's the
20 GIS employee, we sat down, Abu Talal and Wafa Idris and I, and
21 we talked about the subject, I mean a suicide attack.

22 THE COURT: Okay.

23 MR. YALOWITZ: Then the other document that
24 Ms. Ferguson gave us that's very helpful is Exhibit 233, which
25 is a Palestinian Authority report and that report says at the

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1 night in which it was revealed that the person who carried out
2 the attack was shaheeda Wafa Idris. Shaheeda is an Arabic word
3 meaning martyr. And before anybody claimed responsibility for
4 the attack, Tawfiq Tirawi, head of the General Intelligence,
5 which is the same agency that Abu Talal works for, called
6 Khalil Idris, the elder brother of the shaheeda several times
7 and requested that the family would not announce that Wafa was
8 the one who carried out the attack.

9 So a reasonable inference from these two documents is
10 that there was an agency relationship between Wafa Idris and
11 employees of the GIS who knew about the attack even before it
12 was publicly announced and who recruited her to do it.

13 The jury could infer that from the document.

14 THE COURT: Still, that's not an adoption theory.

15 MR. YALOWITZ: Right. That's an agency theory and
16 then ratification goes on top of that.

17 THE COURT: On those facts, if you urge these facts,
18 you don't need ratification.

19 MR. YALOWITZ: I don't even need ratification.

20 THE COURT: So I don't know in what case there's a
21 separate theory of ratification if you don't have a theory that
22 they were employees or agents or known participants at the
23 time.

24 Let's put it this way: I assume every one of your
25 factual scenarios that you believe you're going to demonstrate,

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1 it's going to be your position that the person working for the
2 PA or the PLO at the time.

3 MR. YALOWITZ: Yes.

4 THE COURT: And/or the PA or the PLO participated in
5 either the planning or execution of that act.

6 MR. YALOWITZ: Yes, correct.

7 THE COURT: Where do we get ratification?

8 MR. YALOWITZ: Because it's an additional basis for
9 liability. It's an additional basis.

10 THE COURT: The only thing I don't understand is on
11 these facts, as you're trying to rely upon them, if one cannot
12 conclude on a *respondeat superior* theory or direct
13 participation theory that they were involved, I don't know
14 what's the factual scenario that you have given that
15 constitutes ratification.

16 MR. YALOWITZ: Suppose the jury says, well, I'm not
17 really sure. Okay. I see the evidence that this person was an
18 agent, but I'm just really on the fence about whether they were
19 or not.

20 THE COURT: Then they're not. You lose. You have the
21 burden of proof. If the evidence is equally one way or the
22 other, the plaintiff who has the burden of proof loses on that
23 issue.

24 MR. YALOWITZ: Let me say it a different way: I'm
25 really on the fence as to whether this is an authorized act.

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1 THE COURT: Okay.

2 MR. YALOWITZ: They're an employee.

3 THE COURT: So they're not convinced that it's an
4 authorized act.

5 MR. YALOWITZ: Right. So now we go and say, all
6 right, even if they didn't preauthorize it, which there are a
7 lot of reasons why the circumstances would -- I would argue to
8 the jury, there are a lot of reasons why the circumstances do
9 support *respondeat superior* preauthorization, but even if they
10 didn't preauthorize it, they adopted it as their own through
11 the glorification, through the pay and promotion and naming
12 soccer stadiums after her and that kind of stuff.

13 THE COURT: How does that adopt her acts? How does
14 that make them responsible?

15 If the jury says I'm not convinced that they had any
16 prior knowledge or participated in any way in this act, how is
17 it that any of those subsequent acts makes them responsible for
18 her activity?

19 MR. YALOWITZ: Because if they say in an official
20 report she did this as part of her national duty, now they're
21 saying she did this for us, our nation, the nation that we
22 would like to create in the West Bank called Palestine.

23 THE COURT: Okay. But they're not talking about she
24 did this for the PA.

25 MR. YALOWITZ: Well, I think the jury could infer

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1 that. I think the jury could infer it when they say she's a
2 hero.

3 THE COURT: They can say anything they want to say
4 about her. They could compliment her. They could criticize
5 her. They could say she did a good thing. They could say she
6 did a bad thing. They could say that she did something that
7 advances our interests. They could say she did something that
8 complicates our situation and was detrimental to our interests.

9 Those postacts, those aren't adoptions of her act.
10 Those are judgments about her act. You have to give me
11 something more that makes them legally now responsible for what
12 she did if she did it without their knowledge and without their
13 participation. Simply because they say they're glad she did it
14 doesn't make them legally responsible for her.

15 MR. YALOWITZ: Let's take a starker case. Let's take
16 the case of a police officer who stands up in court and says
17 I'm guilty, I'm proud of what I did, I would do it again, and
18 there are hundreds of police officers just like me waiting to
19 do the same thing.

20 THE COURT: Okay.

21 MR. YALOWITZ: And his court documents are in the file
22 of the PA. And the PA says he's good from a security and
23 morals perspective.

24 THE COURT: Okay.

25 MR. YALOWITZ: They give him promotions.

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1 THE COURT: Right.

2 MR. YALOWITZ: They give him raises.

3 THE COURT: Right.

4 MR. YALOWITZ: They put articles out on their
5 government-owned newspapers and television programs saying he's
6 a national hero.

7 THE COURT: Okay.

8 MR. YALOWITZ: Couldn't a jury reasonably infer that
9 even if we don't have the order saying "go do it," the jury
10 could reasonably infer that postact, given all their knowledge,
11 the fact that they pay him, the fact that they compliment him,
12 the fact that they promote him, those are all, either
13 independently or in combination, a manifestation in the facts
14 and circumstances that they approve of his act, even if it was
15 not originally authorized. That's my theory of ratification.

16 THE COURT: If you say yes, that's true in the way you
17 characterized it, it indicates they approved of his act, but it
18 doesn't tell me why, simply because they do those things
19 postact, it makes them legally responsible for his acts.

20 If a police officer shoots somebody in the street and
21 the person turns out to have been a mass murderer and the
22 police department says later we're glad that he shot this
23 person and now that he shot this person, we have decided that
24 we can close out all of these cases and we have discovered that
25 he murdered ten people. If his family sues the police officer

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1 for some wrongful act for some tort, it doesn't mean because
2 they decided to give him a medal for killing a mass murderer
3 that that makes them liable for the wanton, unjustified
4 shooting that he engaged in which they had nothing to do with.

5 MR. YALOWITZ: There's a case from the First
6 Department that we talk about in our brief. I think it's
7 called Lauani or Laudi, something like that. It's a First
8 Department case. It was an unreasonable force case. It was a
9 hostage situation where the perpetrator had a hostage. It
10 wasn't a 1983 case, so there wasn't the issue of pattern and
11 practice, so it was a classical New York State tort case.

12 THE COURT: Right.

13 MR. YALOWITZ: The First Department said in this case
14 there was enough evidence to go to the jury on unreasonable
15 force, and nobody in advance said to any cop on the
16 scene -- what happened is, somebody shot without hearing
17 orders. Somebody just randomly shot at the perpetrator and
18 killed the hostage. Now the hostage's family goes to sue the
19 NYPD.

20 The first part of the goes to the jury because it's
21 imputing the acts of the employee to the employer, even though
22 it's not preauthorized, and the question was, Were they
23 unreasonably using force?

24 THE COURT: That's because he was on-duty and he was
25 acting within the scope of his employment.

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1 MR. YALOWITZ: Correct.

2 THE COURT: That's not a ratification theory.

3 MR. YALOWITZ: Well, if they then go and give him a
4 medal, that's all the more so; that's just a plus factor.

5 THE COURT: I know. It may be a plus factor, but it's
6 not an independent theory.

7 MR. YALOWITZ: Okay.

8 THE COURT: That's all I'm saying. Your position is
9 you could today decide you want to drop all of those theories
10 except for ratification and you could go to this jury just on a
11 ratification theory.

12 MR. YALOWITZ: That's not going to happen.

13 THE COURT: And just rely upon what they said and did
14 after the acts and not have to have the burden of proving that
15 they had anything to do with the acts before they took place
16 and that you could prove liability that way.

17 The big distinction that you just drew between the
18 example you gave is the distinction of whether the person is
19 on-duty or off-duty. If this was an off-duty cop, your
20 analysis wouldn't hold up because the analysis is dependent on
21 he's within the scope of his employment.

22 So if these people were in the scope of their
23 employment, and I agree with you that you have a *respondeat*
24 *superior* legal claim, then the fact you've proved he's within
25 the scope of his employment may be enough to demonstrate that

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1 they're liable.

2 But if you say that, well, I can't prove that he was
3 working for the PLO or the PA at the time that they engaged in
4 the act, but even though they weren't working for them at the
5 time, I want to use a ratification theory or I'm not sure that
6 there is such a theory to simply say somebody who does an act,
7 not in the scope of their employment, not participated in by
8 the employer or either ordered by the employer or engaged in by
9 the employer, that the employer is simply liable because later
10 on they say that they approve of it and they do things that
11 indicate that they were glad he engaged in this improper
12 conduct.

13 MR. YALOWITZ: I can guarantee you, you're not going
14 to have to decide that issue because we're not going to drop
15 our *respondeat superior* claims, so it's an interesting
16 theoretical question.

17 THE COURT: The only realistic analysis that I need to
18 undergo is that if you have a *respondeat superior* claim, if you
19 can't prove that claim, whether you have the right to prove
20 some adoption or ratification claim, or if you can prove that
21 claim, do you have the right to try to still prove some
22 adoption or ratification claim.

23 There's no such thing as being a participant in the
24 crime and also ratifying it. If you're a participant in the
25 crime, in the conduct, there's no such theory of ratification.

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1 The facts don't support a ratification. They support a theory
2 that you were a participant in the crime.

3 Now, as you say, you can think about whether or not,
4 well, if I'm short on that proof, maybe they can use the other
5 theory. But the way you say it, it approaches it a criminal
6 case if it's somehow a lesser or included offense. It's not.
7 It's a totally different theory that has to be supported by a
8 different set of facts than the facts that you intend to put
9 before the jury.

10 MR. YALOWITZ: I don't think it's a lesser-included
11 offense.

12 THE COURT: Right. So you can't say, well, if I'm
13 missing the element that they were participating beforehand,
14 that even though I proved everything else, I can make it a
15 ratification.

16 MR. YALOWITZ: I think it goes to authorization. It
17 goes to whether it's within the scope of the employment or
18 agency.

19 THE COURT: Right.

20 MR. YALOWITZ: If there's some doubt about whether
21 it's within the scope of employment or agency, it's an
22 alternate way to get there. It's not a substitute.

23 THE COURT: As they say, there are always alternate
24 legal theories, but there's not an alternate set of facts.

25 MR. YALOWITZ: Right.

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1 THE COURT: Only one thing happened. And you have to
2 determine whether or not -- what the evidence is. You can't
3 say they did it this way, but if you don't believe that, then
4 I've got another way that they did it. No. It one thing
5 happened. So you can always have an alternative legal theory,
6 but you can't have alternative facts.

7 So either you're going to put before this jury that
8 these people were working for them at the time, that their acts
9 were approved of when they did it, that they even knew about it
10 or participated in it, encouraged it --

11 MR. YALOWITZ: Or reasonably foresaw it.

12 THE COURT: Again, I'm not sure that you two will
13 agree that that's the language that meets the standard, but
14 reasonably foresaw it --

15 MR. YALOWITZ: Right, that's what Judge Friendly said
16 in the *Bushey* case.

17 THE COURT: Now, whether that defines itself as that's
18 what they intended or --

19 MR. YALOWITZ: Intent is a separate thing. Maybe I
20 should go to material support also. If we have *respondeat*
21 *superior* liability, the intent of the perpetrators is imputed
22 to the employer, right? If they're acting within the scope of
23 their employment, they commit an intentional tort, that intent
24 is imputed to the employer.

25 THE COURT: Yes, but I guess I'm using in a more

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1 generic sense the word "intent." It's got to be intended that
2 this is what they were supposed to be employed to do.

3 MR. YALOWITZ: Yes; it has to be within the
4 foreseeable scope of their employment.

5 THE COURT: Right. This is what they were hired for,
6 partially.

7 MR. YALOWITZ: Let's be really careful about this
8 because we have the *Riviello* case is sort of the classical case
9 with a short order cook and he throws the knife at the
10 customer. And they employer says, look, I didn't tell him to
11 throw a knife at the customer. I didn't give him a medal to
12 throw a knife at a customer and he did it and he shouldn't have
13 done it. And the New York Court of Appeals says that's
14 reasonably foreseeable. He's within the context of those
15 circumstances and they go through like a multifactor test.
16 They say within all of those circumstances, that question goes
17 to the jury whether it's within the scope of his employment.

18 THE COURT: But the simpler analysis there is that
19 he's on the job.

20 MR. YALOWITZ: Right.

21 THE COURT: There's no dispute that he's on the job.

22 MR. YALOWITZ: Right.

23 THE COURT: So that's the classic *respondeat superior*
24 case. You want to put it in a not-so-classical theory that
25 somehow 24 hours a day, seven days a week that anyone employed

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1 by the PLO is employed in a manner that if they decide to
2 commit a terrorist act, it's foreseeable to them and they
3 should be sued for it.

4 MR. YALOWITZ: I think you're overstating my theory.

5 THE COURT: I am overstating it because I want you to
6 correct me.

7 MR. YALOWITZ: Right. That's not my theory.

8 My theory is you have to look at the evidence and the
9 circumstances of this case, with these perpetrators in the
10 context of the time and place where they were acting.

11 THE COURT: Right. But that's not a legal theory. I
12 understand that's what you have to do. The legal theory is
13 what do you have to find.

14 MR. YALOWITZ: Right.

15 THE COURT: In this case, you have to find that it was
16 foreseeable that they would commit this act while they were
17 employed in furtherance of their employment by the PLO.

18 MR. YALOWITZ: Right. Reasonably foreseeable.

19 This is the New York State Pattern Jury Instruction.
20 Among the factors to be considered: The connection between the
21 time, place and occasion for the act.

22 THE COURT: Right.

23 MR. YALOWITZ: The history of the relationship between
24 the employer and the employee as spelled out in actual
25 practice.

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1 THE COURT: Right.

2 MR. YALOWITZ: Whether the action was commonly done by
3 such employees.

4 THE COURT: Okay.

5 MR. YALOWITZ: The extent of departure from normal
6 methods of performance.

7 THE COURT: Right.

8 MR. YALOWITZ: Whether the specific act was one that
9 the employer could reasonably have anticipated.

10 THE COURT: Okay. Why don't you give me an example,
11 take one of the incidents, and give me the example of the proof
12 that you say matches each one of those elements.

13 MR. YALOWITZ: Sure. Let's take the case of the 2004
14 bombing that killed Scott Goldberg.

15 THE COURT: Okay.

16 MR. YALOWITZ: So three of the perpetrators were
17 employees of the Palestinian Authority. They were police
18 officers. They had prior criminal records. And they were kept
19 on the force.

20 During the events of the Al-Aqsa intifada, these
21 particular individuals took hostages in the Church of the
22 Nativity in Bethlehem and they held those hostages for a long
23 time and then they finally negotiated a release. They stayed
24 on the police force, notwithstanding their hostage-taking.

25 By the time of this bombing, there had been literally

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1 hundreds of articles, statements of incitement, not just by,
2 like, some random guy in a mosque, but by Arafat himself, by
3 his top lieutenants, by government-owned newspapers saying this
4 is a good thing to do. There are police magazines. There was
5 a pattern of not just a few guys, but dozens of guys, maybe
6 hundreds of guys who had committed these crimes and who didn't
7 get punished for it.

8 THE COURT: I understand what inferences you want
9 drawn from that, but you're not corresponding that to the
10 elements that you just gave me. Let's go through the elements
11 that you just gave and start with the first element.

12 MR. YALOWITZ: Okay.

13 THE COURT: What about the time, place or anything
14 else --

15 MR. YALOWITZ: Time, place and occasion.

16 THE COURT: Right. What is the time, place and
17 occasion that one would examine that would make this *respondeat*
18 *superior*?

19 MR. YALOWITZ: I would contend that the time, place
20 and occasion is the year 2004, in the West Bank where you have
21 a situation where there's violence being perpetrated by
22 Palestinian police officers. So that's the time, place and
23 occasion.

24 THE COURT: Yes, but that applies to millions of
25 people.

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1 MR. YALOWITZ: Right. Well, it's not millions of
2 people because there's not millions of police officers.

3 THE COURT: You didn't say police officers.

4 MR. YALOWITZ: I meant to. I meant to.

5 THE COURT: No. Police officers is not part of the
6 element that we're discussing. We're discussing the time,
7 place of the incident.

8 MR. YALOWITZ: And occasion.

9 THE COURT: Right: Time, place and occasion. What is
10 it about the time, place and occasion that brings this closer
11 to a *respondeat superior* case?

12 Under your theory, if it happened anywhere in the
13 Middle East -- quite frankly, under your theory, if it happened
14 anywhere in the world, if it happened any time of day, and if
15 it happened on any particular occasion, that's evidence of
16 *respondeat superior*.

17 You're not claiming that the timing is relevant at all
18 if it takes you one way or the other in the direction of
19 *respondeat superior* or not *respondeat superior*, right? Suppose
20 it happened at 8:00 in the morning?

21 MR. YALOWITZ: That doesn't matter.

22 THE COURT: Suppose it happened in 2005 instead of
23 2004?

24 MR. YALOWITZ: That matters.

25 THE COURT: That matters?

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1 MR. YALOWITZ: Right.

2 THE COURT: Why does that matter?

3 MR. YALOWITZ: Because Arafat was dead in 2005.

4 THE COURT: So you said it has to be a time when
5 Arafat was alive?

6 MR. YALOWITZ: When Arafat was instigating terror;
7 right.

8 THE COURT: What does that have to do with -- well, I
9 shouldn't say it like that, but Arafat is not a defendant in
10 this case.

11 MR. YALOWITZ: No, but he was the president of the PA.
12 He was the chairman of the PLO.

13 THE COURT: So you say only when Arafat was head of
14 the PA and the PLO that the PLO is somehow in timing
15 responsible for the acts of terror?

16 MR. YALOWITZ: Right. It's a factor that weighs in
17 favor of *respondeat superior*. It's not the sole factor.

18 THE COURT: When you say "time," you're not talking
19 about time of day.

20 MR. YALOWITZ: Correct.

21 THE COURT: You're talking about only what year it
22 happened.

23 MR. YALOWITZ: Correct.

24 THE COURT: When you talk about place, what place are
25 you talking about?

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1 MR. YALOWITZ: Jerusalem.

2 THE COURT: As opposed to any other city?

3 MR. YALOWITZ: As opposed to Cairo or New York.

4 THE COURT: Suppose it was in Cairo or New York and it
5 was an American citizen killed by someone who was targeting an
6 American citizen and employed by the PLO?

7 MR. YALOWITZ: Different case. Less likely.

8 THE COURT: So you say Jerusalem makes it more likely
9 that it was a PLO *respondeat superior* occasion?

10 MR. YALOWITZ: Right.

11 THE COURT: And the circumstances, what about about
12 circumstances.

13 MR. YALOWITZ: Occasion.

14 THE COURT: Occasion.

15 MR. YALOWITZ: Time, place or occasion. The occasion
16 is a suicide bombing, so that's a technique.

17 THE COURT: That's not an occasion.

18 MR. YALOWITZ: It's the incident; that's what we're
19 talking about.

20 THE COURT: A suicide bombing as opposed to a
21 shooting, that's not an occasion. That's an m.o.

22 MR. YALOWITZ: Yes, as opposed to a street crime. As
23 opposed to, like, a bank robbery or a mugging. The fact that
24 it's a suicide bombing on a bus makes it another factor.

25 THE COURT: Let's go to the second factor.

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1 MR. YALOWITZ: The second factor is the history of the
2 relationship between the employee and the employer as spelled
3 out in actual practice.

4 THE COURT: What are we looking for in that history?

5 MR. YALOWITZ: So we're look at did they hire him even
6 though he had a criminal record? Which they did. Did they
7 keep him on the payroll even though they understood that he was
8 committing terrorist acts? They did. Did they keep him on the
9 payroll even though they knew he was a member of a designated
10 terror entity called the Al-Aqsa Martyrs Brigades? They did.
11 So their relationship with this guy is like what Judge Posner
12 said in Boyne: You give a child a loaded gun and that's an
13 indication that you were reckless in your conduct. So they
14 keep a guy on the payroll who has a history of attacking
15 civilians, that's a plus factor on *respondeat superior*.

16 THE COURT: How do you anticipate proving that he had
17 a history of attacking civilians?

18 MR. YALOWITZ: We have his record, his prior criminal
19 record, and our expert has analyzed it.

20 THE COURT: I'm not sure whether that's subject to
21 expert opinion. Either he has committed acts of terror or he
22 hasn't. No expert adds anything to that.

23 MR. YALOWITZ: There's a record.

24 THE COURT: What do you intend to offer? I assume not
25 live testimony from a witness.

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1 MR. YALOWITZ: Our expert will sponsor the evidence.

2 THE COURT: Your expert is not a fact witness.

3 MR. YALOWITZ: No.

4 THE COURT: This is a fact issue.

5 MR. YALOWITZ: Right.

6 THE COURT: How do you intend to prove that he
7 committed prior acts of terror?

8 MR. YALOWITZ: So for example, coming back to these
9 guys with the Church of the Nativity of Bethlehem, we have
10 documents from the General Intelligence Service, which is the
11 defendants' own documents which say he did it, so that's an
12 easy one.

13 THE COURT: That's what I'm asking. That's part of
14 their argument that you say you have this evidence to present.

15 MR. YALOWITZ: They say I don't. I say I do. So you
16 have to look at the documents.

17 THE COURT: But obviously most of the evidence that
18 you intend to present that indicates that these individuals
19 were involved in these acts of terror or prior acts of terror
20 will be in the form of documents.

21 MR. YALOWITZ: Correct.

22 THE COURT: What makes generally those documents
23 admissible?

24 MR. YALOWITZ: For example, to stay on the General
25 Intelligence Service, that's an admission from the defendants.

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1 That's a document in the regular course. First of all, it's
2 their document that they created in the regular course of
3 business that they produced to me saying this is in response to
4 your document request for intelligence reports.

5 THE COURT: What do they admit in that document?

6 MR. YALOWITZ: They said prior history, and I don't
7 remember it exactly. I don't want to say it wrong.

8 THE COURT: In general.

9 MR. YALOWITZ: In general, he took over the Church of
10 the Nativity or something like that, so that's the history.

11 Should we go to the next one?

12 THE COURT: I went off on a tangent.

13 MR. YALOWITZ: You have the favor of it.

14 THE COURT: I think I have the favor of it. What's
15 much more important really is their main attack is you don't
16 have admissible evidence of this.

17 MR. YALOWITZ: Let me give you one more because I
18 think it's really powerful, and then I do want to talk about
19 material support.

20 The next one is whether the act is one commonly done
21 by such an employee. It's not common for NYPD officers to plan
22 suicide operations, right?

23 THE COURT: You're saying it's common for PLO and PA
24 employees to do that?

25 MR. YALOWITZ: Right.

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1 THE COURT: If they have 100,000 employees --

2 MR. YALOWITZ: Let me give you just one piece of
3 evidence, it's a document, it's from their website, PA police
4 and it says these are our guys who are in jail for committing
5 security crimes, which are crimes like targeting civilians.

6 THE COURT: In jail?

7 MR. YALOWITZ: In Israel.

8 THE COURT: In Israeli jails?

9 MR. YALOWITZ: Right. So they have got 97 guys
10 convicted of committing terror. Now you start to see a
11 pattern, right? It's not just three guys who did this crime.
12 It's part of a pattern.

13 THE COURT: I don't know what those individuals are in
14 jail for.

15 MR. YALOWITZ: I think that could be a reasonable
16 subject of expert testimony. What's a security crime? Why
17 would somebody have a life sentence?

18 THE COURT: I'm just trying to figure out what you say
19 the jury is supposed to conclude from that. Are they supposed
20 to conclude that these 97 people committed terrorist acts by
21 killing or attempting to kill civilians?

22 MR. YALOWITZ: Civilians, right. Right.

23 THE COURT: Is there anything else that they would be
24 in jail for other than that?

25 MR. YALOWITZ: They could be in jail for attempting to

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1 kill soldiers or killing soldiers.

2 THE COURT: I don't know what's the basis you have for
3 saying this, you know, I don't, but you're saying that those
4 individuals are in jail for in fact committing acts of violence
5 against civilians?

6 MR. YALOWITZ: I can't say that all 97 are because I
7 haven't gone through every single one of the 97. We could. It
8 wouldn't be hard to do and give a little summary.

9 THE COURT: I'm trying to figure out what inference
10 you're asking the jury to draw from the fact that 97 people are
11 being held in an Israeli jail.

12 MR. YALOWITZ: The inference is that committing crimes
13 of a security nature is an act commonly done by such employee.

14 THE COURT: What's a crime of a security nature?
15 That's the question.

16 MR. YALOWITZ: It's like a term of art under Israeli
17 law.

18 THE COURT: Right. That's what I want I know. What
19 does it include?

20 MR. YALOWITZ: I will say it goes the gamut from being
21 a member of a terrorist organization on up to multiple mass
22 murders.

23 THE COURT: So if I'm a member of Hamas and I've never
24 committed any terrorist act, I could still be in jail for it?

25 MR. YALOWITZ: You wouldn't be a member of Hamas.

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1 THE COURT: But a member of Hamas could be one of
2 these 97 people who are in a security status because their
3 membership, not because they, in fact, engaged in any violent
4 terrorist act.

5 MR. YALOWITZ: I don't think 13 years after the fact,
6 I don't think so.

7 THE COURT: I don't know. I'm asking.

8 MR. YALOWITZ: I don't think so. Look, this is a
9 reasonable subject for the experts on what are the security
10 crimes, what are these people in jail for? And there's a lot
11 of admissions, it's not just this one, there are a lot of
12 admissions where they say we send our people, these were our
13 people, we want them back and so on and so forth.

14 THE COURT: I understand the thrust of the argument.
15 I agree with you with regard to genuine admissions by the
16 defendants that those are admissible against them in court.

17 MR. YALOWITZ: Right.

18 THE COURT: Now, other than an admission by them, what
19 other type of evidence do you want to offer other than live,
20 under oath, nonhearsay testimony?

21 MR. YALOWITZ: Convictions. Convictions, that's a
22 good document to put in to prove that somebody is a terrorist,
23 right, their actual conviction.

24 Then I think where we're having some conflict with the
25 defendant is on government reports. So if there's a government

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1 report, an Israeli government report that's a legally
2 authorized representation of fact and they say we have done an
3 investigation and we conclude that this guy committed this
4 bombing and that's why we're seizing his bank account, that's a
5 legally authorized investigation, the report on which is
6 admissible under 803(8).

7 THE COURT: Explain to me what would be the relevant
8 purpose of that evidence? To prove what?

9 MR. YALOWITZ: This is the document that Ms. Ferguson
10 was showing you where the report says Nayef Abu Sharkh was
11 behind the bombing on June 19, 2002, so I'm offering it for the
12 truth of that statement.

13 THE COURT: To prove what? What's the relevant
14 purpose of that?

15 MR. YALOWITZ: To prove Abu Sharkh is an employee of
16 the defendants, so there's evidence that he participated, he
17 was behind the bombing that injured my client.

18 THE COURT: How does that advance your argument that
19 they're responsible for the incident that happened to your
20 client?

21 MR. YALOWITZ: Because he's unrelated to the
22 defendant. If he's unrelated to the defendant, right, if he's
23 just a guy, if he's a guy that they had nothing to do with,
24 they never heard of, then how are they legally responsible?

25 THE COURT: No. My question is different. It's not

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1 focusing on his relationship with them; it's focusing on what
2 is the logical conclusion you want the jury to draw from the
3 fact that he committed a unrelated act of terror?

4 MR. YALOWITZ: No. It's one of our cases.

5 THE COURT: So this is not a situation where you're
6 trying to demonstrate that they were known terrorists. You're
7 trying to demonstrate that there was some conclusion that they
8 committed this act?

9 MR. YALOWITZ: Correct.

10 THE COURT: Now, from this document, would you believe
11 that this document in any other context would be admissible for
12 the truth of that statement in any other case in this court?

13 MR. YALOWITZ: Yes, of course.

14 THE COURT: What's the exception to the hearsay rule?

15 MR. YALOWITZ: It's 803(8) because it's a factual
16 finding from a legally authorized investigation.

17 THE COURT: Why is this a factual finding with regard
18 to a legal investigation if this wasn't what the investigation
19 was about?

20 MR. YALOWITZ: If you look on the very front page, and
21 which exhibit is it, your Honor?

22 THE COURT: It's 339.

23 MR. YALOWITZ: If you look on the very front page, it
24 says operation for the confiscation of terror funds.

25 THE COURT: Right.

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1 MR. YALOWITZ: And then the second paragraph says
2 information regarding these bank accounts was presented to the
3 legal elements of the ISA, IDF, the ISA is the Internal
4 Security Authority, IDF which is the army and the attorney
5 general's office, all of whom authorized the operation, a
6 person whose funds was confiscated will be able to appeal the
7 decision. What we have here is an investigation for the
8 purpose of seizing funds.

9 Just like in OFAC, if OFAC seized some of these funds
10 and OFAC made a finding that a guy did a particular act and
11 issued a report on it and then the attorney general's office or
12 some public spokesman made a press release, now we're in a
13 civil case, I'm not in a criminal case, so it's a fact finding,
14 a legally authorized report of an investigation finding a fact.
15 It's admissible under that hearsay exception because it's a
16 civil case.

17 THE COURT: This is one of the documents of the 177
18 exhibits that they lodged an objection to?

19 MR. YALOWITZ: No. The 177 are their records. This
20 is an Israeli government record. The 177 records are like
21 employment records, pay records, martyr files, documents that
22 came from the defendants' own files, and the plaintiffs said
23 would you please produce the payroll records of Marwan
24 Barghouti, and then they produced them and now they say, well,
25 we deny they're authentic.

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1 THE COURT: Is this document also objected to?

2 MR. YALOWITZ: Every document is objected to. They
3 will not stipulate.

4 THE COURT: I'm not talking about a stipulation. Is
5 there an objection to the admissibility of this document?

6 MR. YALOWITZ: Every document.

7 THE COURT: So what's the difference between what's on
8 the 177 list and what's not on the 177 list?

9 MR. YALOWITZ: The 177 are their own documents. I
10 wanted to try the low-hanging fruit.

11 THE COURT: How many other exhibits are we talking
12 about that they object to that they believe that those
13 documents are inadmissible other than the 177?

14 MR. YALOWITZ: 800.

15 THE COURT: Is there any document that they don't
16 claim falls under that category that you intend to offer?

17 MR. YALOWITZ: They have no objection to three
18 documents.

19 THE COURT: So approximately of the 980 exhibits that
20 you want to offer, there are three that they don't have an
21 objection to.

22 MR. YALOWITZ: Something like that, yes. But really,
23 the motion on the 177 was -- look, the real issue with the 177,
24 as you'll remember, is kind of right when I came in the case,
25 we were trying to get a 30(b)(6) to authenticate the 177 and

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1 foundationalize them. And Judge Ellis said I'm not going to
2 allow any more discovery. We took it to you. And you said
3 Judge Ellis didn't use his discretion. We're going to find a
4 reasonable way to foundationalize those documents. So that's
5 the 177.

6 Frankly, looking at the briefing on it, I don't think
7 that we need a foundational witness. I think the act of
8 production is enough to foundationalize these documents.

9 THE COURT: It depends. And this is what I have been
10 thinking about getting from both of you: It depends on what
11 factual statement in the document you want to offer for the
12 truth. I need you to identify that for me, and I need them to
13 identify what factual assertion in the document that they
14 believe is inadmissible or prejudicial.

15 So if it says John Doe has three sisters, I'm not
16 particularly interested in fighting about whether or not John
17 Doe has three sisters if there's no relevant, germane issue
18 with regard to that.

19 If you want to offer a document that, and they seem to
20 have today conceded that they're not taking a stance that they
21 think that there's some objection to any of the statements or
22 activities that are directly attributable to them that are, in
23 fact, true, for example, if this terrorist act happened on
24 June 19 of 2002 and one of their documents says on June 20,
25 2002, they paid this individual a certain sum of money, it

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1 doesn't seem to me that they can genuinely dispute if that is a
2 true statement that fact if that's the evidence that you want
3 to put before the jury.

4 And unless they tell me that they're saying that's not
5 true, then it seems to me that you would be entitled in some
6 form to put that true piece of evidence undisputed before this
7 jury, either in the form of a document or in the form of their
8 admission, because if they're not going to deny it and they say
9 it is, in fact, true, I'm not particularly interested in
10 hearing an objection to the document that says it.

11 MR. YALOWITZ: I feel the same way, but we can't seem
12 to get them to withdraw any of their objections.

13 So do you want to take an example of one?

14 THE COURT: You have advanced this significantly for
15 me. I know that the nature of your proof is admissions by
16 them.

17 MR. YALOWITZ: Right.

18 THE COURT: It's documents created by them and in
19 their files, official reports.

20 MR. YALOWITZ: Right, admissions like in their police
21 magazines and so forth.

22 THE COURT: Give me an example of that.

23 MR. YALOWITZ: I'll give you an example. I'm going to
24 look at paragraph 56 if I can find my 56.1 statement.

25 This is from a police magazine. This is, like,

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1 political guidance put out by the PA police department for its
2 police.

3 THE COURT: So you say it is a statement put out by
4 the PA.

5 MR. YALOWITZ: Right. I'll just read it. I'm reading
6 from page 14 of my 56.1. Their idea to choose existence on
7 their land is a crime. The creation of their western state on
8 this very land is a crime. Their insinuations are crimes.
9 Their smiles, like snake poison, are crimes. Honor is far from
10 these creatures. It is not found in the dictionaries of their
11 language.

12 Obviously, I'm not offering that for the truth. I'm
13 offering that to show intent, to show state of mind, to show
14 the circumstances under which it's reasonably foreseeable that
15 your employees who read that kind of crap will go out and kill
16 people.

17 THE COURT: Putting aside any objection on relevance
18 grounds or any objection that somehow is more prejudicial than
19 probative, what purpose would you be offering it other than to
20 demonstrate that, in fact, this is a statement that was made by
21 the PA?

22 MR. YALOWITZ: You've caught it exactly right: It's a
23 statement made by the PA.

24 THE COURT: Okay. What do you understand the nature
25 of their objection is? That it's not a statement made by the

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1 PA?

2 MR. YALOWITZ: No. I think the nature of their
3 objection is that they will object to everything they can to
4 run up the expense for me as much as they can.

5 You've asked me what my views are. That's what my
6 views are.

7 THE COURT: I'm asking you to give me something that
8 would be helpful for me to resolve this.

9 MR. YALOWITZ: Let me put it this way: I don't think
10 they have a legitimate basis for any objection.

11 THE COURT: What is their stated objection?

12 MR. YALOWITZ: I'd have to look. You can ask them.
13 It's their objection, but I'm sure they made a hearsay
14 objection. Authenticity is an issue.

15 THE COURT: Why is that hearsay?

16 MR. YALOWITZ: It's not hearsay. It's offered for
17 truth. I'm sure they made an authenticity objection, but it's
18 their own document and it has PA police files, and we have
19 experts who can come that they say I know these magazines.

20 THE COURT: As I say, as I already indicated to them,
21 if they genuinely tell me that it's in dispute and they deny
22 that they ever put out that statement, then I may put you to
23 the heavier burden to demonstrate that they did put out that
24 statement.

25 MR. YALOWITZ: Right.

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1 THE COURT: But if the fact is that they put out that
2 statement and there's no genuine objection that it is not what
3 it purports to be, then they have got to give me another basis
4 to keep it out because that's not a basis to keep it out.

5 As I say, if they want to say it's irrelevant or
6 somehow more prejudicial than probative, I can weigh those
7 things, but that doesn't go to the foundation for its
8 admissibility.

9 MR. YALOWITZ: Agreed.

10 THE COURT: There may be other reasons to exclude it.

11 MR. YALOWITZ: And that would be something that I
12 would think you would decide in the context of trial. That's
13 up to you.

14 THE COURT: I'll give you as early a ruling I can give
15 you in the context in which I'm confident that I understand
16 that it's going to come in and the purpose for which it's going
17 to come in.

18 MR. YALOWITZ: Right.

19 THE COURT: But if you tell me that, look, your
20 primary evidence are statements and admissions of the
21 defendants and official results of investigations, at least I
22 understand the nature of what you want to offer.

23 What other category of document do you think I should
24 focus on?

25 MR. YALOWITZ: I think you have the core categories:

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1 Convictions, the defendants' own records, the defendants' own
2 admissions.

3 THE COURT: What is the form of the convictions that
4 you want to offer?

5 MR. YALOWITZ: In Israel, they don't have a judgment
6 of conviction like we do. I'm talking to you, but they don't
7 have that, so you have to piece it together a little bit from
8 the hearing transcripts.

9 Often you have, like, an amended indictment. They'll
10 plead to an amended indictment and then they'll plea and
11 they'll just say I plead to the indictment. There's no Rule 11
12 allocution. They don't do that. There's just a plea of guilt.
13 There's an indictment or an amendment of indictment, there's a
14 plea of guilt, and then there's a sentencing verdict that says
15 what their sentence is, so those three.

16 If they didn't plead, then there's a verdict which is
17 like a written opinion. They have a three-judge trial system;
18 they don't have a jury system.

19 THE COURT: Right. So why is anything more relevant
20 or admissible other than the plea or the page of the judgment?

21 MR. YALOWITZ: Because you got to know what they pled
22 to.

23 THE COURT: I don't know what they pled to by looking
24 at their plea?

25 MR. YALOWITZ: Right. It just says "I plea to the

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1 amended indictment."

2 THE COURT: Okay.

3 MR. YALOWITZ: "I'm guilty of the amend indictment."

4 THE COURT: What is the form of the amended
5 indictment?

6 MR. YALOWITZ: It kind of looks what we would have.

7 THE COURT: So other than the accusation, the amended
8 indictment and the plea of guilty itself, what else?

9 MR. YALOWITZ: Sentencing.

10 THE COURT: Why is sentencing relevant?

11 MR. YALOWITZ: Because you have to know that they're
12 in jail for life.

13 THE COURT: Why? What's that relevant to?

14 MR. YALOWITZ: It goes to the gravity of the crime.
15 It goes to the seriousness of it.

16 THE COURT: I'm not sure I understand that. I didn't
17 even understand that in the context of the United States.

18 If somebody is convicted of murder, I don't know, I
19 don't say necessarily that I will exclude it, but if somebody
20 is convicted of murder, why do I need to know how much time you
21 got?

22 MR. YALOWITZ: Let me reflect on that, your Honor,
23 because it was my assumption that you would need the whole
24 package to understand the conviction. But as you rightly point
25 out, it may be that we don't need the sentencing.

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1 THE COURT: It depends on for what purpose you're
2 offering it, you see. I don't have that context.

3 MR. YALOWITZ: Right.

4 THE COURT: If you're saying you're offering this to
5 show that he's a really bad person because he got a really long
6 sentence, that's one thing. If you say I'm offering it to show
7 that this person was convicted of a certain terrorist act so it
8 is evidence to the jury to consider whether he, in fact,
9 committed that act, that's a different question.

10 MR. YALOWITZ: It's both.

11 THE COURT: Then you have to tell me why both are
12 relevant.

13 MR. YALOWITZ: Obviously, the fact that he did it, the
14 fact that an employee did it, we understand why that's
15 relevant, right? That goes to the causation.

16 THE COURT: We're talking about the acts at issue, not
17 prior act?

18 MR. YALOWITZ: Correct. Correct.

19 So the indictment will say, for example, this guy is
20 charged with murdering Scott Goldberg.

21 THE COURT: Right, and then it says he pled guilty to
22 murdering Scott Goldberg.

23 MR. YALOWITZ: Right. And then he gets 16 life
24 sentences, one for each person killed.

25 THE COURT: What difference does that make?

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1 MR. YALOWITZ: I'll tell you why.

2 THE COURT: Other than its prejudicial value?

3 MR. YALOWITZ: I don't think it's prejudicial, but I
4 understand why somebody might argue that.

5 THE COURT: I'm trying to figure out the relevance.

6 MR. YALOWITZ: Yes. Then that information is
7 transmitted back to his employer. And so it's not that he's in
8 jail as Ms. Ferguson said for throwing stones; he's in jail for
9 killing 16 people.

10 THE COURT: I know. We have what he was accused of
11 and we have that he pled guilty to killing 16 people. What
12 else do we need?

13 MR. YALOWITZ: It goes to the serious of the crime.

14 THE COURT: I'm sorry. Whether he got one life
15 sentence, five life sentences or ten life sentences doesn't
16 make it anymore or less serious if you told me he killed 16
17 people.

18 MR. YALOWITZ: I hear what you're saying. I hear what
19 you're saying. I'd like to reflect on it, but I do hear what
20 you're saying. It does go to the issue of the employer's state
21 of mind, but I do want to reflect on it.

22 THE COURT: See, that's the problem: It's not a
23 relevant state of mind because the sentence I assume is long
24 after or after he committed the acts. So whether or not a year
25 or two years later or three years later he got 16 life

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1 sentences, it doesn't tell me anything about whether or not
2 they participated in the 16 murders.

3 MR. YALOWITZ: Don't you think it goes to punitive
4 damages, though? If you have guys who go to jail for huge life
5 terms -- we don't have punitive damages on the federal claims
6 but we have punitive damages on the nonfederal claims.

7 THE COURT: I'm not sure the probative value outweighs
8 the potential prejudice because you tell me he killed 16
9 people, I get a jury in this box and you're telling me he
10 killed 16 people, I don't think that they particularly care
11 about whether or not he got five, ten or 15 life sentences. In
12 their mind, he should have gotten 16 life sentences if he
13 killed 16 people, but they know that's not the way the world
14 works. If you get convicted of 20 people in the United States,
15 you may only get life in prison concurrently. That doesn't
16 tell me more or less about the circumstances under which he
17 committed the crime.

18 Quite frankly, you know what the other side is going
19 to argue? They're going to argue simply, what else did you
20 think they were going to do with it? That that was not a
21 objective legal determination. That was a biased political
22 decision that they made to give him 16 life sentences. That's
23 not a side issue for the jury. The seriousness of the crime is
24 not judged by the length of the sentence when somebody is
25 killed. When somebody is killed, there's no more serious crime

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1 that the killing of one human being.

2 MR. YALOWITZ: I agree with that.

3 Let me say this because you raise a really important
4 issue about the nature and scope of this trial, your Honor,
5 which is I do not want there to be arguments on either side
6 about biased political issues; that this was a political
7 decision, this or that.

8 I heard Ms. Ferguson say that the reason for the
9 policy of paying employees who continue in jail is because of
10 the Israelis this or the Israelis that. Frankly, I don't get
11 that. First of all, does she have legislative history or some
12 finding of the legislature of the PA saying why they have a
13 certain policy? So I don't even get it.

14 But the idea that we're going to have people in this
15 courtroom trashing the Israelis this, the Israelis that, the
16 Zionist entity, I don't want to hear any of that and I don't
17 think your Honor wants to hear then any of that.

18 THE COURT: As opposed to trashing the PA or the PLO
19 in general? Come on. Let's be realistic about the sides that
20 are lined up here.

21 MR. YALOWITZ: The state of Israel is not on trial
22 here. The PA and the PLO are on trial. And what I'm talking
23 about is using their words, not mine. I'm not going to go say
24 nasty things about people of Arabic descent and that kind of
25 thing. I'm saying what are their words.

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1 THE COURT: Unless they can convince me otherwise, I
2 can assure you that that's not how this trial is going to be
3 conducted.

4 MR. YALOWITZ: Good.

5 THE COURT: This trial is going to be conducted on
6 whether or not you have sufficient evidence to demonstrate that
7 they're responsible for the acts that you are accusing them of.

8 MR. YALOWITZ: Right.

9 THE COURT: That has nothing to do with the relevant
10 part of that discussion we had about payments to people. The
11 question is not why they paid people in general. They can give
12 some minimal background as to why they pay people. The
13 question is why did they pay these people?

14 MR. YALOWITZ: Right.

15 THE COURT: And the question is, did they pay these
16 people because they're similarly situated as the other people
17 that they routinely pay or whether it's paying these people is
18 evidence that they paid them for committing these acts.

19 MR. YALOWITZ: Right.

20 First of all, if they come forward with some documents
21 saying this is our policy and this is why we have it and we pay
22 everybody is same, that would be one thing. I haven't seen any
23 documents like that.

24 THE COURT: I assume you would agree it that doesn't
25 have to be a written document.

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1 MR. YALOWITZ: I haven't seen any indication that they
2 have got a witness to say that either, a witness with actual
3 personal knowledge instead of experts who are going to come in
4 and say generally trashy things.

5 THE COURT: As they say, I am cautious about both
6 sides' experts who just want to come in and say trashy things.

7 MR. YALOWITZ: That's not going to happen with my
8 experts. I can promise you that.

9 THE COURT: This is a fact-based case.

10 MR. YALOWITZ: I agree with that.

11 THE COURT: Not an expert-based case. An expert's
12 opinion is not appropriate to simply tell me that they have an
13 opinion that a certain fact occurred. The jury doesn't need
14 them for that.

15 What they need is the underlying facts that the expert
16 is using to reach that conclusion so we can see whether they
17 can reach that conclusion on their own; and if they can't, then
18 it is not appropriate to try to say that they should reach that
19 conclusion because the expert decided he reached that
20 conclusion.

21 MR. YALOWITZ: The experts are really needed in this
22 case to lay down the context for what is the General
23 Intelligence Service? What is the PA police? How do they
24 work? That kind of stuff.

25 THE COURT: That's beyond the usual knowledge of most

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1 jurors.

2 MR. YALOWITZ: Right.

3 THE COURT: Therefore, in the abstract, it would be
4 appropriate to have someone who has specialized knowledge in
5 that area to explain that to the jury. That's true.

6 But with regard to "I've looked at a whole bunch of
7 documents and I conclude that this guy is the guy who
8 perpetrated this act," that's not an expert opinion.

9 MR. YALOWITZ: I don't think we want our experts to
10 opine on ultimate conclusions like that.

11 THE COURT: As I said, we go through this now because
12 I think this is the guidance I want to give you and set you up
13 in terms of how to approach things.

14 MR. YALOWITZ: That's very helpful. I think our
15 experts are basically going to perform two complementary
16 functions: One is to give the background and knowledge and
17 understanding to the average juror about what goes on in the PA
18 in terms of their ownership of media or their control of media
19 or the way their GIS works and things like that; the other
20 thing is, you need some witness to explain what a document is
21 and how it relates to that general understanding. The experts
22 will be there to provide some commentary on what the documents
23 are and how they relate to that context.

24 THE COURT: That might be appropriate in some
25 instances, but the usual practice is that the person who either

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1 generates the document or is the custodian of the document or
2 has received the document or utilizes the document is the
3 person usually that is appropriate for that purpose. Now, you
4 don't have a lot of that.

5 On some issues, an expert may be appropriate to do
6 that, particularly to the extent that the parties don't
7 disagree that that is what it is and that is what it means, but
8 to the extent both sides object to anything the other side
9 wants, I don't have a real feel for where the genuine issues
10 lie here. Everything you want to do they oppose; everything
11 they want to do, you oppose, so it doesn't give me a whole lot
12 of guidance.

13 MR. YALOWITZ: Some of the experts I like.

14 THE COURT: Why don't you write the list down for
15 them.

16 MR. YALOWITZ: I think they know. They saw me talk to
17 their experts.

18 THE COURT: Maybe they saw your list.

19 MR. YALOWITZ: I don't think they like our experts,
20 but they know which ones of theirs I like.

21 THE COURT: To the extent that I can do some
22 examination and make at least some preliminary assessment to
23 what extent I think the evidence that you want to admit is in
24 admissible form and if that evidence is admitted in admissible
25 form, that that evidence would be sufficient for a reasonable

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1 jury to use to conclude that the defendants are liable for the
2 conduct that you say they're liable for, that would be my
3 approach.

4 It's still a little difficult for me to figure out
5 what you are really fighting about when you say to me that,
6 well, the only thing I want to offer is admissions, official
7 government reports, judgments of conviction, and -- I forget
8 what other category you had.

9 MR. YALOWITZ: And their own records. I would sort of
10 subdivide the admissions. They're all admissions.

11 THE COURT: Well, not necessarily. Again, it depends
12 on what part of the document that you're offering for the
13 truth.

14 If they generate a document and the document says I
15 spoke to John Doe and John Doe said Sally committed the crime,
16 it's difficult to offer that simply as a business record to
17 prove that Sally committed the crime.

18 MR. YALOWITZ: Right. There's one more bucket I would
19 say. Just let me come back to the last bucket, but first I
20 want to answer your question, which is, let's take, for
21 example, the payroll records which you would think wouldn't be
22 that hard. If you look at Exhibit 1, just pull it up.

23 I don't know if you have it in Ms. Ferguson's binder,
24 but I can tell you it's a document that says pay the following
25 people, and one of the people on there is Marwan Barghouti.

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1 Marwan Barghouti is an important player in the case. He was
2 kind of the underboss for Arafat. He was convicted of
3 terrorism. He's sitting in an Israeli jail, even today. So
4 there's this list, and it says how much they paid him. They
5 produced that because we said please give us your documents
6 relating to Marwan Barghouti, and they did.

7 THE COURT: Right.

8 MR. YALOWITZ: That's a document we want to use to
9 prove that they paid that amount of money to Marwan Barghouti.

10 THE COURT: Right. They don't deny making those
11 payments?

12 MR. YALOWITZ: All I can tell you is they won't
13 withdraw their objection to that document.

14 THE COURT: You understand the nature of their
15 objection to that document is what?

16 MR. YALOWITZ: Authenticity and hearsay.

17 THE COURT: What is it that makes it unauthentic?

18 MR. YALOWITZ: I can't imagine why they would say it's
19 unauthentic. They produced it in response to plaintiffs'
20 document request, so I can't imagine why they won't admit its
21 authenticity. It boggles my mind. My mind begins to go to
22 things like vexatious litigation and things like that. And I
23 can't imagine why they won't acknowledge that it's admissible
24 for the truth. It's their record.

25 THE COURT: I assume you haven't examined any witness

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1 who denies that payment was made?

2 MR. YALOWITZ: Correct. I think their gain here, your
3 Honor, and remember, this is -- before I came to the case, we
4 didn't sit with a witness and go document by document.

5 THE COURT: And a lot of these documents you say
6 weren't produced.

7 MR. YALOWITZ: A lot weren't produced until after the
8 close of discovery, that's right. Not every single one. And
9 there were some that they admitted were authentic because they
10 were produced before and there was a request for admission.

11 Anyway, here we are. I'm very happy to go document by
12 document from one until the end with you or Judge Ellis or the
13 defendants, but I can't get them to agree on anything so it's a
14 fool's errand to sit with them it seems to me, or at least it
15 has been so far.

16 THE COURT: If I told you, for example, on that
17 document, I told you to articulate in a sentence or quote the
18 line from the document that you believe is admissible for its
19 truth, what would you say?

20 MR. YALOWITZ: Well, if your Honor will indulge me, I
21 can hand up the document. I'll show it to you.

22 THE COURT: I want to figure out how you'd
23 characterize it.

24 MR. YALOWITZ: On the date indicated on the document,
25 the amount of money indicated on the document was paid to

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1 Marwan Barghouti; that's what I'm looking for.

2 Just coming to the other bucket, there are a few
3 documents, not a whole lot, but there are documents that are
4 confessions. Like the one we read where the guy said Abu Talal
5 and I and Wafa sat together and talked about a suicide bombing,
6 so that's a postarrest statement in custody.

7 THE COURT: On what basis do you say that it's
8 admissible in the form that you want to offer it?

9 MR. YALOWITZ: It is an admission, it is a statement.

10 THE COURT: It's not an admission by them.

11 MR. YALOWITZ: No. It's a statement against penal
12 interest by an unavailable witness, so the witness is not
13 within the subpoena power. It's a statement against interest.

14 THE COURT: Is this a statement by someone who is
15 convicted or not convicted?

16 MR. YALOWITZ: Convicted. He was convicted on the
17 basis of that statement and other evidence.

18 THE COURT: Why do you need both?

19 MR. YALOWITZ: There are occasions where, for example,
20 if they pled, it's not crystal clear. The statement itself is
21 a better piece of evidence than the accusatory instrument.

22 THE COURT: But you're offering both of those for the
23 same purpose to demonstrate that, in fact, he committed that
24 offense?

25 MR. YALOWITZ: Or that the conversation took place.

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1 THE COURT: What conversation?

2 MR. YALOWITZ: The declarant says Abu Talal, which is
3 a PA employee, and I sat together with Wafa Idris, the suicide
4 bomber, and talked about a suicide bombing. I want to offer
5 that statement for the truth. I want that to come in for the
6 truth because it links a PA employee to the perpetration of the
7 terror act. It's a useful statement. It's not an admission by
8 the defendants, but it's a statement against interest.

9 THE COURT: See, the awkward part about that is you
10 want to use it against not the person who made the statement,
11 but you want to use it against this defendant.

12 MR. YALOWITZ: Right.

13 THE COURT: Why?

14 MR. YALOWITZ: It's a statement by an unavailable
15 witness against interest.

16 THE COURT: But the part of the statement where he
17 said I committed the offense is a statement against penal
18 interest; the part of the statement that accuses a third party
19 is not a statement against penal interest.

20 MR. YALOWITZ: I think it's the *Williamson* case, if
21 you look at that, they talk about a statement very similar to
22 this: So and so and I committed the crime.

23 THE COURT: Right.

24 MR. YALOWITZ: That is a statement that comes in not
25 only -- with the Sixth Amendment, you've got to redact if

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1 you're using it, but there's no confrontation clause issue
2 here.

3 THE COURT: Right.

4 MR. YALOWITZ: So it is a statement against interest,
5 and in the context of a statement against interest, he's
6 inculcating an additional coconspirator.

7 THE COURT: The problem is, and I'd have to examine
8 the statement, examine the statement and assess it further,
9 what you want to offer and the purpose that you want to offer
10 it for is not consistent with why the rule exists and why a
11 statement against penal interest or a statement against
12 interest is more reliable than another statement because the
13 rationale is I wouldn't confess to a crime under circumstances
14 that I believed that it would expose me to penalties unless it
15 were true.

16 MR. YALOWITZ: Right.

17 THE COURT: But that rationale doesn't apply to I
18 wouldn't accuse a third party of a crime because accusing the
19 third party would expose me to criminal or civil penalty.

20 MR. YALOWITZ: Right. So if he's in custody and he
21 says --

22 THE COURT: He says you did it.

23 MR. YALOWITZ: I didn't do anything; Abu Talal did it,
24 okay, that's not a selfinculpatory statement.

25 THE COURT: All right. Suppose he says, I did it, I

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1 did it with Yalowitz, would it be admissible against Yalowitz?

2 MR. YALOWITZ: There would be confrontation clause
3 issues.

4 THE COURT: No, I'm not talking about the
5 confrontation clause issues. This is a civil case. If he,
6 outside of court, said that he committed the crime with you, do
7 you think that would be admissible against you in a civil
8 proceeding?

9 MR. YALOWITZ: I think it would.

10 THE COURT: Why? Why is the portion that you want,
11 that he's accusing a third party, why does that qualify as a
12 statement against his penal interest?

13 MR. YALOWITZ: Because it's integral to the statement.

14 THE COURT: No, it's not integral to the statement.
15 He can say I committed it, and I committed it with others. Who
16 did you commit it with? I'm not going to tell you.

17 MR. YALOWITZ: He can do that.

18 THE COURT: It's not integral to the statement against
19 penal interest.

20 MR. YALOWITZ: I think that the purpose of the rule is
21 to protect against false accusations.

22 THE COURT: Right.

23 MR. YALOWITZ: So where you have a guy who says, yeah,
24 I did it and I did it with X, and he's indicating that he did
25 it with somebody who is an important intelligence senior

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1 officer, he's explaining the circumstances of what he did, and
2 I think if you look, there's a discussion in the *Williamson*
3 case about this exact scenario and we have to look at it. But
4 my recollection of that case is that at least under 804, it
5 comes in. Now, the defendant can argue the circumstances are
6 untrustworthy or you can't believe him.

7 THE COURT: How does one defend themselves against
8 that, an out-of-court statement accusing the third party?

9 MR. YALOWITZ: They can bring Mr. Abu Talal to court.
10 He's their employee. They can bring him in and have him
11 testify. I didn't see him on their witness list but they can
12 bring him in.

13 THE COURT: What makes you think that he's necessarily
14 under their control and he will say the truth here as opposed
15 to falsely accusing them still?

16 MR. YALOWITZ: No. They could bring Abu Talal.

17 THE COURT: I see.

18 MR. YALOWITZ: Right. The custodial statement is by a
19 guy who is now jail. He's an unavailable witness. But he
20 inculcates their employee, a senior employee. They could bring
21 him.

22 THE COURT: How many instances of that do you wish to
23 put before this jury?

24 MR. YALOWITZ: I don't know. There's half a dozen,
25 something like that.

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1 THE COURT: Out-of-court statements by people who were
2 convicted and they have accused third parties, and you want to
3 offer that as evidence that the third parties committed the
4 crime?

5 MR. YALOWITZ: That the third parties participated in
6 some way.

7 THE COURT: Committed the crime.

8 MR. YALOWITZ: Right.

9 The other example of that is this fellow Abdullah
10 Barghouti. Abdullah Barghouti was the Hamas bomber who killed
11 66 people. He was one of the ones who was let out of jail and
12 he was given bomb-making equipment, money, cell phone, stuff
13 like that. So a lot of his postarrest statements are also very
14 relevant.

15 THE COURT: Is that the only evidence that you have
16 with regard to most of these individuals that you want to offer
17 that would indicate that they were participants in the crime?

18 MR. YALOWITZ: No. I think Barghouti and Noor are the
19 only ones I can think of. There may be others, but they're not
20 ones that I think have a high focus.

21 THE COURT: Say that again. They're the only ones
22 that what?

23 MR. YALOWITZ: They're the only ones I think I know
24 of, the only ones I can think of are those two.

25 THE COURT: Think of as what?

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1 MR. YALOWITZ: As examples of the custodial statements
2 that I want to use for the truth.

3 THE COURT: What I'm trying to understand is whether
4 or not you have -- the only evidence of that is the custodial
5 statement, as opposed to some other evidence that they were
6 involved.

7 MR. YALOWITZ: In both cases, it's really important
8 evidence. In the case of Abu Talal, it's that statement and
9 the document that I read to you and then the conviction of
10 Noor, so there are three documents. That custodial statement
11 is really clear and it really crystalizes it.

12 THE COURT: With regard to those two other
13 individuals, those two other individuals, you have no other
14 evidence other than the custodial statement that they
15 perpetrated the terrorist act?

16 MR. YALOWITZ: With regard to Talal, that's the only
17 link I have, the custodial statement, and the conviction of
18 Noor, which finds the custodial statement credible.

19 Noor is the guy who made the statement. Noor says,
20 look, I confess, I did it; I recruited Wafa with this PA
21 employee.

22 THE COURT: So the only evidence that you have against
23 Talal is Noor's statement that Talal committed the offense.

24 MR. YALOWITZ: Right.

25 THE COURT: On two occasions, he made that statement:

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1 One is when he was interrogated and two is when he pled guilty.

2 MR. YALOWITZ: Right. I want to say he pled guilty.
3 I'm not 100 percent sure on that. He may have appealed his
4 sentence.

5 THE COURT: But did he make that statement in his
6 court proceeding?

7 MR. YALOWITZ: No. I think what happened with Noor is
8 that he pled guilty but appealed his sentence. I may be wrong
9 about that, but I know he appealed. And the appellate court
10 repeated the statement as explaining his involvement.

11 THE COURT: You want to offer both Noor's statement
12 and the appellate decision.

13 MR. YALOWITZ: The appellate decision, it might come
14 in as a government report or something.

15 THE COURT: But it's simply a regurgitation of the
16 same statement that you want to independently --

17 MR. YALOWITZ: Correct. It finds it credible. It's a
18 judicial finding that the statement was credible.

19 Then with Abdullah Barghouti, I have go back and think
20 about what other evidence I have with him. Abdullah Barghouti,
21 we haven't really talked about him. There are a lot of guys
22 named Barghouti, but Abdullah Barghouti was a Hamas bomb-maker.
23 He was on the most-wanted list that General Anthony Zinni gave
24 to Arafat and said you've got to arrest these guys. Then there
25 was intelligence that he was going to blow up a restaurant and

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1 then he did blow up the restaurant.

2 It was a very devastating attack. He was arrested
3 that day and he was held for about three weeks and then they
4 released him. The PA arrested him, kept him for three weeks.

5 THE COURT: Right.

6 MR. YALOWITZ: They let him go. And from the time of
7 his release to the time of his rearrest, he killed another 50
8 people. He was a bomb-maker. He made these Mother of Satan
9 bombs.

10 So a lot of what we know about what he did during the
11 time of his freedom, if you will, the time between when he was
12 released and rearrested, comes from his custodial statements:
13 Who he was protected by, who he got money from, who he got
14 bomb-making equipment from, where he stayed.

15 THE COURT: That was before or after the incident,
16 that testimony?

17 MR. YALOWITZ: Before our bombing.

18 THE COURT: Right.

19 MR. YALOWITZ: Right. So he's released, and he's
20 protected by senior PA operatives that give him money, they
21 give him bomb-making equipment, and then he's in a Hamas terror
22 cell. He and his co-Hamas terrorists go on a killing spree.
23 It must be six or eight separate suicide bombings, including
24 one that killed four of our clients' family members. What we
25 know about what he did during the interim period comes

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1 primarily from his postarrest confession.

2 THE COURT: So you want to offer some law enforcement
3 recorded report of what this witness said occurred?

4 MR. YALOWITZ: Correct. These are of a similar
5 nature. So I got bomb-making equipment from X or I got money
6 from X or X gave me a safe house.

7 THE COURT: And the grounds on which you want to do
8 this is, again, a statement against penal interest?

9 MR. YALOWITZ: Right.

10 THE COURT: I understand.

11 MR. YALOWITZ: Your Honor, if you could indulge me,
12 there's just one other thing that Ms. Ferguson said that I want
13 to try to address, which is this business about intent to
14 target Americans. I think if you read Judge Weinstein's
15 opinion in *Gill*, this gets straightened out.

16 There are certain crimes where the nationality of the
17 victim is an element of the crime, like killing a U.S. national
18 abroad. So if that's a predicate crime, the courts have said,
19 like the Seventh Circuit said, if you're using that as a
20 predicate crime, killing a U.S. national abroad, that's an
21 element that you need to prove, like your predicate crime, and
22 one of the elements of that crime is recklessness, knowledge or
23 intent with regard to Americans.

24 THE COURT: Right.

25 MR. YALOWITZ: But there are other crimes which are

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1 the crimes that we're charging like material support to a
2 terrorist organization. And material support to a terrorist
3 organization doesn't have in it an element that the terrorist
4 organization is targeting Americans. So under that
5 circumstance, intent to target Americans is not an element of
6 my burden of proof. I could read it because there's a lot of
7 evidence that the place, Israel, the West Bank, it's crawling
8 with Americans, you can't swing a dead cat without hitting an
9 American.

10 THE COURT: You have two different issues, and even if
11 I were to accept that, then it puts you in a circumstance where
12 you have a crime that was committed abroad against non-U.S.
13 citizens, how do you get an ATA crime?

14 MR. YALOWITZ: It's an element of my case that my
15 client is a U.S. citizen, but there's no factual dispute about
16 which clients are U.S. citizens and which are not.

17 THE COURT: So I'm not sure which allegations are
18 counts that you say this is going to be dispositive of.

19 MR. YALOWITZ: My dispute with the defendants is I
20 don't want a jury instruction saying that I have to prove that
21 the defendants were intentionally, recklessly, knowingly or
22 intentionally putting Americans in harm's way. That's not an
23 element of the state of mind.

24 THE COURT: You just want to be able to prove that
25 Americans happened to be the victims, even unintended victims,

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1 of the crime.

2 MR. YALOWITZ: Right, even if they were unintended
3 victims.

4 THE COURT: I'll look at that. I have to remind
5 myself. I think I have dealt with it in the *In Re: Terrorist*
6 situation.

7 MR. YALOWITZ: Right. I don't always agree with him
8 but Judge Weinstein I think got this one right.

9 THE COURT: Smart guy.

10 MR. YALOWITZ: He was my evidence professor. He's a
11 special human being.

12 THE COURT: He wrote the rules of evidence. He said
13 to me once: This is the way they interpret it, but that's not
14 what we meant.

15 MR. YALOWITZ: Not today, but I'll tell you a great
16 story about Judge Weinstein and Judge Gleason that you'll be
17 amused by. Anyway, we don't need to do it on the record.

18 If your Honor doesn't have more questions, I'm done.

19 THE COURT: Let me wind up Ms. Ferguson, and then I
20 want to tell you what I need from you on guidance.

21 MR. YALOWITZ: Thank you.

22 THE COURT: Yes, Ms. Ferguson.

23 MS. FERGUSON: Thank you, your Honor. I just wanted
24 to touch on a couple of points.

25 I wanted to emphasize that both the Sokolow incident

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1 as well as the Hebrew University incident turn entirely on the
2 admissibility of these custodial statements implicating a third
3 party. So they're trying to use them to show what the PA and
4 PLO did and that just doesn't come in under 804(8)(3). So I
5 want to emphasize when you look at the papers you'll see that,
6 in fact, those are very critical and it's our position they're
7 not admissible, and we briefed that.

8 With respect to the Mandelkorn incident which we
9 started with, the only evidence linking the PA is the Israeli
10 Ministry of Foreign Affairs document that we have looked at a
11 couple of times. That's Trial Exhibit 339.

12 Mr. Yalowitz treats this very quickly as an 803(8)
13 public record but, in fact, it doesn't set out the activities
14 of the Israeli Ministry of Foreign Affairs. It talks about
15 activities of other offices and it's just relaying a couple of
16 layers of hearsay.

17 In addition, it doesn't show factual findings from a
18 legally authorized investigation. It doesn't reflect any
19 factual findings that Abu Sharkh was involved in this bombing
20 that's at issue here.

21 THE COURT: You're saying that your position is it has
22 to articulate specifically those factual findings?

23 MS. FERGUSON: It doesn't even purport to be factual
24 findings on the investigation; it's just saying we seized the
25 suspected terrorists' funds and if they want to challenge that,

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1 they can come appeal.

2 THE COURT: That's not what it says. It doesn't say
3 anything about "suspected." It says he committed a crime.
4 That was their conclusion.

5 MS. FERGUSON: There's no factual findings backing
6 this up. This would be highly prejudicial for a jury to see
7 this.

8 THE COURT: Are you arguing that the requirement is
9 that it's not admissible unless it comes along with the
10 specific factual evidence that they examined to reach this
11 conclusion?

12 MS. FERGUSON: As an initial matter, it would have to
13 be the factual findings of the Israeli Ministry of Affairs
14 which created the document, and it's clearly not.

15 They're just relaying, I don't know what. They're
16 relaying something communicated by something called the GPO
17 that they apparently heard from one of several other agencies.
18 And we don't know anything about what the investigation was or
19 what the findings were.

20 THE COURT: I'm not sure where you get that from.

21 MS. FERGUSON: It's Plaintiffs' Exhibit 339. It's an
22 Israeli Ministry of Foreign Affairs' website. In the next
23 after you get to the operation for the confiscation heading, in
24 parentheses it says communicated by the GPO, so that's one
25 level of hearsay.

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1 THE COURT: Why isn't this then a report by the GPO, a
2 conclusion by the GPO?

3 MS. FERGUSON: It says the Israeli Ministry of Foreign
4 Affairs is communicating this as something they got from the
5 General Press Office, which is talking about what, in the next
6 line, what the IDF forces guided by ISA officers did, and
7 there's no evidence that the Israeli Ministry of Foreign
8 Affairs conducted any investigation that made findings into Abu
9 Sharkh's involvement in the attack.

10 I think the question is if this is all there is for
11 the Mandelkorn case, can a reasonable jury looking at this
12 document - and this is the only evidence - could a reasonable
13 jury find liable the PA and PLO for engaging in an act of
14 international terrorism and subject them to treble damages
15 based on this alone? And this is all there is.

16 I would say they can't get past summary judgment with
17 just this document. It's way too attenuated. It's way too
18 slender a reed to link the PA and the indicia of liability are
19 not there, right? So the ISA is sweeping in seizing people's
20 funds and saying we think he did this. There's no evidence of
21 indicia of reliability there in the context of this conflict,
22 and it just doesn't meet the terms of 803(8).

23 Again, I wanted to highlight that there are a few of
24 these cases that are relatively simple to resolve because
25 they're based on either a custodial statement or one of these

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1 Israeli ministry documents where it's multiple levels of
2 hearsay that doesn't fall under 803(8).

3 THE COURT: I'm not sure that the multiple layers of
4 hearsay apply to this exception. I have to look at that. I
5 don't think it's directed at layers of hearsay. It's directed
6 as to whether or not it is a conclusion that is drawn based
7 upon an investigation that was conducted.

8 It doesn't say, and I don't think the requirement is,
9 that that investigation can't include hearsay statements. I
10 conduct hearings all the time and some of those hearings
11 involve hearsay statements that are admissible, and I make
12 conclusions based on some of those hearsay statements.

13 MS. FERGUSON: I guess the difference would be if the
14 FBI conducted an investigation and issued a report, that might
15 be one thing, but this is the FBI engaged in an operation and
16 they told another agency that they had done something and then
17 that agency reported it to the State Department and the State
18 Department says it.

19 THE COURT: Why isn't that a report by the State
20 Department based on the State Department's investigation?

21 MS. FERGUSON: Because it's not setting out the
22 activities. Reading the language of the rule, it's not setting
23 out the activities of the declarant. It has to be a record or
24 statement of a public office if it sets out that office's
25 activities.

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1 THE COURT: It's the record of the Israeli Ministry of
2 Foreign Affairs.

3 MS. FERGUSON: Or factual findings from a legally
4 authorized investigation, and there's no evidence that that was
5 the factual findings of a legally authorized investigation.

6 THE COURT: I'll look at that more carefully.

7 MS. FERGUSON: But I guess the overriding point would
8 be if that's all there is, it's not enough to survive summary
9 judgment because a reasonable jury couldn't find just based on
10 that alone PA and PLO liability.

11 With respect to the issue of intent with respect to
12 Americans, in the *Gill* case, the Court does find that to be a
13 critical element. In fact, plaintiffs are relying on material
14 support statutes. Under 2339A, a predicate criminal act is an
15 intent to kill Americans; and 2339B has a strong U.S. nexus
16 requirement.

17 So the reason these cases are brought here is because
18 there's to be a showing that the defendants had some scienter
19 or some state of mind with respect to harming Americans.

20 THE COURT: I'll look at that more carefully, but I've
21 never seen a situation of an attack on civilians in Israel
22 where it was not available as a reasonable inference that they
23 knew or should have known that it's likely that American
24 citizens were going to be harmed.

25 MS. FERGUSON: I think this is where some of these

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1 generalized payment policies and causation and intent all
2 mingle together. If their main evidence, their main claim is
3 that we paid prisoners after the fact and that shows something,
4 there's no evidence that prisoners are paid or general salary
5 payments were made with any sort of knowledge or intent that
6 those particular people would go out and harm Americans. So
7 again, we have to focus on evidence of intent, evidence of
8 causation and that's absent.

9 THE COURT: The question really is, is whether or not
10 on this evidence it would be reasonable for a jury to review
11 this evidence and have the opportunity to conclude that the
12 perpetrators of the act knew that it was likely that Americans
13 would be killed.

14 MS. FERGUSON: I think it's not just the question of
15 whether the perpetrators knew but whether the defendants who
16 are being sued, they're the ones that need to have engaged in
17 the act of international terrorism and need to have the
18 scienter.

19 THE COURT: I'm not sure that there's a fine line
20 there to be drawn. If the perpetrator knew, I'm not sure I'd
21 be in a situation to be able to keep from the jury a
22 determination of whether or not if the perpetrator knew and the
23 perpetrator was doing it at the behest of his employer or her
24 employer that that knowledge should be imputed to the employer.

25 MS. FERGUSON: There's no evidence at all of anybody

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1 acting on the behest of the PA or PLO. There's no evidence of
2 any of the perpetrators were acting with an intent to harm
3 Americans. They mostly had beef with the Israelis and the IDF
4 and were acting to avenge deaths of relatives or friends.

5 THE COURT: The question is, it seems to me, a close
6 one in terms of whether or not a jury would be entitled to
7 reasonably conclude on this evidence that the perpetrators of
8 this act understood that it was likely that they were going to
9 be killing or injuring Americans.

10 I'd have to exclude that reasonable conclusion by the
11 jury that it's more likely than not that that was the case
12 based on if you're sitting in an English-speaking restaurant
13 where Americans are known to congregate, I'm not sure it
14 wouldn't be the jury's determination of whether or not it's
15 reasonable to conclude under those circumstances whether or not
16 the perpetrators of the crime, or those who participated in it,
17 were disregarding the likelihood that Americans were going to
18 be killed and that Americans would be expendable under their
19 intended target.

20 MS. FERGUSON: I know the afternoon is wearing on, so
21 I would say in closing that there's been a lot of statements
22 about knowledge of people being terrorists and Arafat
23 instigating terror and there's been a lot of claims.

24 I think, at the end of the day, we need to look at the
25 evidence and decide whether it would be admissible and whether

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1 the admissible evidence is such that a reasonable jury could
2 find in the plaintiffs' favor. I think when you actually look
3 at the evidence and see what a lot of these cases are based on,
4 things like custodial statements implicating third parties and
5 documents that aren't, in fact, admissions of the PA and PLO,
6 then I think you'll find we're entitled to summary judgment.

7 Thank you, your Honor.

8 THE COURT: Let me focus on what I need from you and
9 whether or not this is a genuine issue.

10 Is it going to be your position that documents that
11 were produced by you that were prepared by one of your
12 employees and kept as records in your files, the files of the
13 PA or PLO, that something is lacking with regard to foundation?

14 MS. FERGUSON: I'm going to let my colleague Brian
15 Hill address that.

16 MR. HILL: For the record, Brian Hill.

17 If I can address that. It's going to depend on the
18 document.

19 THE COURT: Why should it depend on the document?

20 MR. HILL: Because there are different kinds of
21 documents with different kinds of statements, and it's going to
22 depend on what statement the plaintiffs want to offer and for
23 what purpose they want to offer it.

24 THE COURT: Right, but I'm trying to separate the two
25 issues. I'm trying to separate particularly when you said "it

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1 depends," I assume it primarily depends upon if they're
2 offering the document for the truth of a statement that's made
3 in the document that is either genuinely in dispute or not made
4 by your client.

5 MR. HILL: Or repeats hearsay from a third source;
6 yes, your Honor.

7 THE COURT: I assume it would fall outside of the two
8 categories.

9 MR. HILL: Those are the principal issues.

10 THE COURT: Right. But the records themselves, if
11 they're able to overcome the hearsay objection or they're
12 offering it for a nonhearsay purpose, do you genuinely have a
13 foundation objection to documents that are kept in your
14 clients' files prepared by your clients' employees and produced
15 by your clients in discovery?

16 MR. HILL: There's three different categories there:
17 In the file, produced in discovery and prepared by employees.

18 THE COURT: Right.

19 MR. HILL: Not everything in the file is produced by
20 employees.

21 THE COURT: Okay. I'm talking about documents that
22 fall into all three of those categories.

23 MR. HILL: We're excluding things that we got from
24 third parties. The only things that our employees created?

25 THE COURT: Well, I'm not sure. It's difficult for me

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1 to understand what it is you've produced that was obtained from
2 third parties.

3 MR. HILL: We have newspaper records, we have oral
4 statements that have been written down in the files.

5 THE COURT: What obligation would you have to
6 produce -- I understand what your production would be in
7 response to him.

8 MR. HILL: I want to correct something. Mr. Yalowitz
9 suggested that he requested specific types of records. That's
10 untrue. The request was for any document that had a person's
11 name in it and we've responded to that.

12 THE COURT: So, why would you go out and get a
13 newspaper article that's not in your possession to produce in
14 this case?

15 MR. HILL: Because we produced intelligence files,
16 which include hearsay.

17 THE COURT: Whose intelligence files?

18 MR. HILL: The intelligence files of the Palestinian
19 Authority.

20 THE COURT: Why doesn't that qualify as a document in
21 the files of the Palestinian Authority created by an employee
22 of the Palestinian Authority?

23 MR. HILL: A newspaper is not created by the
24 Palestinian Authority, but it is in my clients' files because
25 they gather intelligence. There's all sorts of hearsay in the

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1 files. That's what intelligence files are, a collection of
2 hearsay.

3 THE COURT: Other than newspaper articles, which
4 depends on, again, they had some other nonhearsay basis --

5 MR. HILL: Our files contain oral and written
6 statements from third parties that the plaintiffs, I
7 understand, want to offer for the truth of the matter asserted.
8 They want to offer it for exactly as your Honor suggested that
9 John Doe told me Sally did it and they want to prove that to
10 show that Sally did it. That's what I understand, and this is
11 part of the problem: They won't tell me which statements in
12 the documents they wish to offer and whether they wish to offer
13 them for their truth or for some other purpose. So we're
14 preserving the objections not knowing what it is that they
15 intend to offer it for.

16 The other issue, frankly, is the discovery issue. If
17 the Court will indulge me. I want to read from the transcript
18 of the first discovery conference in the case which was held
19 before --

20 THE COURT: No. I don't want to go into that detail
21 on this issue.

22 MR. YALOWITZ: I really don't --

23 MR. HILL: I'll withhold it. The bottom line is the
24 plaintiffs recognized at the outset that they would need to
25 take discovery to lay the foundation for this sort of document.

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1 Because the witnesses were going to be unavailable, they chose
2 to forego that. You denied it twice.

3 THE COURT: We have been through this already. This
4 part we have been through. I'm trying to move forward.

5 This is what I want from both sides: With regard to
6 the 177 documents, I want the plaintiffs to identify, as simply
7 as possible, the information, and if it can be quoted, quote
8 the statement in that document that you say is admissible,
9 relevant, and that you wish to offer.

10 If I have a three-page document you tell me what it is
11 in that document you're trying to get before the jury. Quote
12 it to me if you can if it's simple; otherwise, try to simplify
13 it for me so I can look at it.

14 What I also want at the same time, and I'll give you a
15 date so you can simultaneously do this, I want to know from the
16 defendants what information in the document that you said you
17 want to keep out of this case, that you say is inadmissible and
18 should not be offered. I want to know what you're objecting
19 to. We have two problems, not just your problem. Your problem
20 is not knowing what they want to offer and for what purpose; my
21 problem is not knowing what it is you're objecting to and why.

22 So I need to know exactly what it is you want to put
23 before this jury in that document, what fact you want to put
24 before the jury, and if that fact is simply quoted from there,
25 that's simple.

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1 I want to know from the defense at the same time what
2 allegation in that document that they're objecting to, all
3 right, not a general objection to the document. I want to know
4 what they say is the inadmissible portion of that document that
5 they want me to rule cannot come in. Then I can focus on it
6 and I can make some judgment with regard to the nature of the
7 information that is at issue.

8 MR. HILL: If I can make a suggestion: I think it
9 would make sense for us to get their admission first;
10 otherwise, there may be a lot of unnecessary time.

11 THE COURT: Not for me.

12 MR. HILL: There may be things they want to offer that
13 we object to and that's just a waste.

14 THE COURT: No, that's not a waste for me because
15 that's exactly what I want to see. I want to know what you
16 genuinely believe at this point that you're objecting to. If
17 you don't know it, then you don't have an objection, a specific
18 objection.

19 I want to know if you've looked that documents and
20 whether you say, you know what, he wants that and that's not
21 admissible against us. You should have gone through that
22 process and you should be able to tell me what that is if you
23 are at this point standing on your objection to the document.

24 MR. HILL: Yes. The only point I mention is the way
25 you've articulated it is that I, as the defendant, know he

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1 wants that and I object to it.

2 THE COURT: No, I didn't say that.

3 MR. HILL: I'm sorry. I apologize.

4 THE COURT: I'm saying I wanted you to tell me what in
5 that document that you object to, all right? Now, you say we
6 object to this line because it is a hearsay statement and I
7 don't want to know why. I don't want an argument. If you say
8 you object to this line that says John Doe said Sally committed
9 the crime, then you tell me that's what you object to so I can
10 focus.

11 All I want to know is the exact factual statement in
12 the document. I want to know from the plaintiffs what factual
13 statement they want to put before the jury in that document and
14 I want to know from you what statement in that document that
15 you're objecting to to coming before the jury. And I don't
16 even want to know why. I just want you to lay it, pull it out
17 of that document, put it next to the document number and tell
18 me this is what we want out of this document, this is what we
19 object to going before this jury. That's all I want at this
20 point in time first. Then I can examine that.

21 Now, I can tell you, and I may not have to get there,
22 but I can tell you to the extent that they want something in
23 the document that is genuinely not a factual issue that's in
24 dispute, I am not going to be favorably inclined to spend time
25 trying to keep that out.

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1 And if, to the extent that it is a statement of what
2 the PLO or the PA did or a statement about what the PLO or the
3 PA said through any actual representative, then it is likely
4 that I will first want from you and have them submit to you a
5 request to admit whether that's true or not, and you'll either
6 deny it or admit it.

7 Then if you deny it, then I can determine whether or
8 not it is something that should come in and under a different
9 form if you have a genuine basis, a factual basis, or whether
10 it should come in at all.

11 If you admit it, I can decide whether or not that
12 means that it should come in in the form of the document or
13 whether or not that means that the admission itself should come
14 in in place of the document, because if that's the relevant
15 information and you admit that relevant information, then I
16 have to make a decision of whether the document comes in either
17 in any form, redacted or unredacted.

18 So if they gave me something with regard to Exhibit
19 177 and they tell me they want this statement for its truth and
20 you tell me that it's another part of the document that you
21 have an objection to, then maybe I'll have them redact the
22 document and redact the portion you have an objection to and
23 put in the portion that they say is relevant and admissible and
24 would further the jury's determination in this case, but I need
25 to see that. And I need to see that simply by going through

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1 each exhibit, pulling out of that exhibit what the statements
2 are in that exhibit that you want to offer before the jury.

3 The simpler the better because I'll put it to you this
4 way: The more complicated it gets, the less likely that you're
5 going to get what you want. Let's keep it simple and keep it
6 to the point and don't quote me two-thirds of the document and
7 then after having me read the document and realize that three
8 quarters of what you quoted to me don't advance the true
9 consideration in this case whatsoever.

10 There have to be some critical facts in this document
11 that have to be fairly obvious to me why the plaintiffs want it
12 and fairly obvious me as to why the defendants don't want it.
13 So identify those for me and exchange those at the same time.

14 Once I get those, and I may ask for some response, but
15 I want to see it first, and if you want to spend some time
16 trying to come to terms given our discussion today to work out
17 some issues based on what you think I am likely to do rather
18 than what you want to do, then I would encourage that.

19 But otherwise, I'm going to go through that list and
20 I'm going to see what the nature of the information is that is
21 being offered and what the nature of the information is that
22 you want to keep out. I'll see what the pattern is to that.

23 I'll see whether or not it advances my determination,
24 whether or not those facts are going to be presented at all,
25 whether those facts are going to be presented through this

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1 document, whether that document is going to be redacted or
2 unredacted, or whether that document is going to be admitted to
3 the jury in the form of the admission by the other side that
4 that is, in fact, a true fact.

5 That's the situation I want to be in so that I can be
6 in a position to intelligently resolve this dispute and any
7 anticipated disputes about the documents and the admissibility
8 of the documents. I'm going to take that approach with most of
9 the documents that you're fighting about. Let's see if you can
10 do that for me.

11 I don't think it's necessary at this point given the
12 discussion, but I was thinking about asking the defense to go
13 through each one of these exhibits to tell me whether or not
14 you agree whether or not it's a document that's in your file,
15 whether or not it's a document that was prepared or a file that
16 was prepared by your employee and whether or not it was kept in
17 your file, but I'm not going to do that because I think, as I
18 indicated here, to the extent that that's the case, it's not
19 likely that you're going to be able to object on the basis that
20 the document itself is inadmissible because it is not a
21 business record.

22 With regard to documents taken from other sources,
23 again, I need to know what it is that we're really fighting
24 about in those documents and for what purpose those documents
25 are being offered, and we can have a further discussion the

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1 next time we meet as to how those documents will be dealt with.

2 What I'm anticipating at this point, I think I'm
3 anticipating receiving it by August 29. I think I'm receiving
4 a request to charge by August 29.

5 MR. YALOWITZ: The request to charge is August 8 and
6 the objections to the request to charge -- I forget what the
7 last business day of August is.

8 THE COURT: I think that's the 29th. That's the
9 objection to the request that I'm receiving.

10 MR. YALOWITZ: Right.

11 THE COURT: And our next date is --

12 MR. YALOWITZ: September 16, I think.

13 THE COURT: If you can give me what I have just
14 requested by August 15, that would be appreciated. Is that an
15 unreasonably short period of time or can you do that with
16 regard to the 177 exhibits?

17 MR. YALOWITZ: Your Honor, if we can just have an
18 extra couple of days. Both Mr. Horton and I are out of the
19 country, or I'm out of the country. Maybe a week later.

20 THE COURT: A week later, the 22nd.

21 MR. YALOWITZ: That would be great.

22 THE COURT: I'm getting a lot of paper so I need to
23 keep going through it. Let's say the 22nd. Give me that on
24 the 22nd. As I said, that should be a simple list that I can
25 run down and see as to Exhibit 10, what part you want to offer

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1 and what part they are objecting to at this point in time, and
2 then we can have further discussion by the September date with
3 regard to those issues.

4 As I say, to the extent they end up not objecting to
5 the part that you say that you want to admit --

6 MR. YALOWITZ: Then we're done.

7 THE COURT: -- then maybe I can redact the document if
8 they're concerned about something different, but I assume
9 there's going to be a combination of those things depending on
10 the exhibits.

11 Let's do that. Let me get the request to charge. I
12 want to see if we can keep ourselves on schedule, see if I can
13 go forward and try to resolve this and any outstanding motions
14 by the time we meet next. Then I think we have another
15 conference scheduled in November. Then we can start talking
16 about ensuring that we're on schedule for the dates and talk
17 more about what the actual length of the trial might be and
18 whether we're going to continue with the trial dates that we
19 were talking about.

20 MR. HILL: There is one other legacy date that I think
21 it makes sense to put off for now. There is, from several
22 orders ago, a deadline of September first for additional
23 pretrial matters. I think since you have summary judgment
24 under advisement, it would make sense to await your ruling and
25 then at that point address pretrial matters.

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1 THE COURT: What's additional pretrial matters?

2 MR. YALOWITZ: I beg you not to do that.

3 The game here is to bring more *in limine* motions, more
4 motions, they want to dream up a bunch of new motions.
5 Whatever pretrial motions we have, we have a schedule for it,
6 everybody agreed to it, your Honor so ordered it. Let's not be
7 moving the schedule and delaying things.

8 We have witnesses. We have told all of our witnesses
9 come, you're going to be coming in January and February.
10 People are coming from all over the world to New York. They're
11 planning their lives. To start with eroding the schedule now,
12 I beg you not to do it. It's a delay tactic.

13 THE COURT: I'm not sure what the substance of the
14 applications are.

15 MR. HILL: Right now there's this old deadline of
16 September first for any other pretrial matters.

17 THE COURT: What do you intend to do on that date or
18 subsequent?

19 MR. HILL: For example, we haven't addressed
20 plaintiffs' damages and plaintiffs' damages experts yet and I
21 can file by September first. But it's going to be a waste of
22 time if you're going to dismiss any of these cases, which
23 obviously we're waiting for your ruling on that. So it seems
24 to me we should wait until October first to bring those matters
25 and that we can resolve them at the November conference.

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1 MR. YALOWITZ: I'm absolutely outraged.

2 Your Honor gave these people 90 pages to do whatever
3 *in limine* motions they wanted. And you said I'm going to give
4 you one round of *in limine* motions. Now I'm hearing they want
5 to file a new round of *in limine* motions in October when I'm
6 supposed to be getting my witnesses ready to testify.

7 It's an outrage. It's an absolute outrage.

8 THE COURT: I've been around long enough; there are
9 very little outrages. The bottom line is my dispassionate
10 response is I'm going to leave the same dates that we have set.

11 MR. YALOWITZ: Thank you, sir.

12 THE COURT: You should move forward.

13 As a matter of fact, if there's anything that you
14 think that you want to raise with regard to this trial, if
15 you're aware of it now, you should raise it early rather than
16 later. So I will move forward and I will move forward to
17 resolve these issues. But to the extent that you have issues
18 that you feel need to be addressed for trial, you should at
19 least focus those issues and make me and the other side aware
20 of those issues on the schedule that we have, even if we have
21 to do a further examination of those issues.

22 I set a very tight schedule and carved out a
23 significant amount of my time and other cases' time so we can
24 stay on this schedule.

25 MR. YALOWITZ: Thank you, your Honor.

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1 THE COURT: I'm going to move as efficiently as we
2 possibly can so we can all be prepared to go forward in
3 January.

4 MR. YALOWITZ: If I may, I just want to respond to one
5 thing that Ms. Ferguson said.

6 THE COURT: Yes.

7 MR. YALOWITZ: The attack that the Mandelkorn family
8 was injured in June 19, 2002, Ms. Ferguson said the only
9 evidence that we have is this one document that we have been
10 going over. I just want to be very clear that that's not
11 correct because by June of 2002, the Al-Aqsa Martyrs Brigades
12 was a designated terrorist organization. So in addition to our
13 *respondeat superior* theory, for that case, we also have a
14 material support where they're giving weapons, money and
15 resources to Al-Aqsa Martyrs Brigades, which claimed
16 responsibility for this particular attack.

17 It's not a 2339A claim where I have to show that they
18 were supporting an attack; it's a 2339B claim where I have to
19 show they were giving money, weapons and so forth, freedom of
20 operation, to the terrorist organization which perpetrated the
21 attack. I just didn't want to leave the record to suggest that
22 this case depends on so thin a reed. Thank you.

23 THE COURT: I'm going to start moving forward and
24 going through this material so we can resolve this. As soon as
25 I get your request to charge, I'm going to start looking at

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1 that because that helps in giving some guidance about how you
2 think these issues should be resolved by a jury.

3 Then I'll see you in September. I'll get the other
4 materials and whatever other issues come up, we'll start
5 gearing those up so we can resolve those and decide those
6 between September and November.

7 MR. YALOWITZ: Thank you.

8 MS. FERGUSON: Thank you.

9 (Adjourned)